Supreme Court, U.S.
FILED

No. 091164 MAR 24 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

MISENER MARINE CONSTRUCTION, INC. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
E-Mail lawdjb@emory.edu

JAMES L. CHAPMAN, IV
W. RYAN SNOW
GUILFORD D. WARE
Of Counsel
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, Virginia 23510
Phone (757) 623-3000

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court overrule the doctrine, first enunciated in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917), that state statutes which "work material prejudice to the characteristic features of the general maritime law [or] interfere with the proper harmony and uniformity of that law in international and interstate relations," are impliedly preempted?

2. Even if *Jensen* remains and applies to matters properly within admiralty jurisdiction, should a state statute granting attorneys' fees to a prevailing party be preempted in light of this Court's concern, in *American Dredging Co. v. Miller*, 510 U.S. 443, 452-54 (1994), with "substantive" state law "rule[s] upon which maritime actors rely in making decisions about primary conduct"?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. In proceedings before the district court, other parties involved were General Gas Carrier Corporation, the owners of the LPG/C "STEVEN N", PCS Phosphate Company, PCS Nitrogen Fertilizer, L.P., and the Georgia Ports Authority. See App. 1a, 20a. None of these parties appeared in the court of appeals, having been dismissed by the district court. See App. 21a.

RULE 29.6 NOTICE

Petitioner, Norfolk Dredging Company, has no significant shareholders or parent corporations.

TABLE OF CONTENTS

Page

Questions Presented for Review . . . . . (i)
List of Parties Below . . . . . (ii)
Rule 29.6 Notice . . . . . (ii)
Opinions Below 1
Statement of Jurisdiction 1
Statutory Provision Involved 2
Statement 2

Reasons for Granting the Petition 9

JENSEN SHOULD BE EITHER OVERRULED OR FURTHER CABINED 9
A. The Time Has Come To Overrule *Jensen* 10
B. Even If This Court Is Disinclined To Overrule *Jensen*, Review Should Be Granted As To Whether A State Statutory Award of Attorneys' Fees Is Impliedly Preempted . . 27

Conclusion 36

Appendix
January 21, 2010, Eleventh Circuit Opinion . . . . . App. 1a

November 24, 2008, District Court Opinion . . . . . App. 20a

Georgia Prompt Pay Act (GPPA), Ga. Code Ann. § 13-11-1 *et seq* . . . . . App. 34a

TABLE OF AUTHORITIES

Page

CASES

All Underwriters v. Weisberg,
222 F.3d 1309 (11th Cir. 2000) 31
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975) 28
American Dredging Co. v. Miller,
510 U.S. 443 (1994) ..... *passim*
Aqua-Marine Constructors, Inc. v. Banks,
110 F.3d 663 (9th Cir. 1997) 26
Aurora Maritime Co. v.
Abdullah Mohamed Fahem & Co.,
85 F.3d 44 (2d Cir. 1996) 26
Ballard Shipping Co. v. Beach Shellfish,
32 F.3d 623 (1st Cir. 1994) 25, 26
Davis v. Dep't of Labor & Indus.,
317 U.S. 249 (1942) 14, 15
E. River S.S. Corp. v. Transamerica Delaval, Inc.,
476 U.S. 858 (1986) 6, 23
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 13, 26
Fleischmann Distilling Corp. v. Maier Brewing Co.,
386 U.S. 714 (1967) 28
Garan, Inc. v. M/V AIVIK,
907 F. Supp. 397 (S.D. Fla. 1995) 5
Hughes v. Foster Wheeler Co.,
932 P.2d 784 (Alaska 1997) 33, 34
In re Exxon Valdez,
270 F.3d 1215 (9th Cir. 2001) 25

INA of Texas v. Richard,
800 F.2d 1379 (5th Cir. 1986) 31
Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995) 22
Just v. Chambers, 312 U.S. 383 (1941) 15
Knickerbocker Ice Co. v. Stewart,
253 U.S. 149 (1920) 14
Kossick v. United Fruit Co.,
365 U.S. 731 (1961) 11, 16, 17, 18
Lochner v. New York, 198 U.S. 45 (1905) 12
The LOTTAWANNA,
88 U.S. (21 Wall.) 558 (1874) 13
Natco Ltd. P'ship v. Moran Towing of Florida, Inc.,
267 F.3d 1190 (11th Cir. 2001) 5
Norfolk Southern Ry. v. Kirby,
543 U.S. 14 (2004) 23, 32
Pace v. Insurance Co. of North America,
838 F.2d 572 (1st Cir. 1988) 30
Paul v. All Alaskan Seafoods, Inc.,
24 P.3d 447 (Wash. App. 2001) 34
Pope & Talbot v. Hawn,
346 U.S. 406 (1953) 5, 6, 15, 24
Romero v. International Terminal Operating Co.,
358 U.S. 354 (1959) 15, 16, 24
Sosebee v. Rath,
893 F.2d 54 (3d Cir. 1990) 8, 29, 30
Southern Pacific Co. v. Jensen,
244 U.S. 205 (1917) . . . . . *passim*
Southwestern Sugar & Molasses Co. v. River Terminals Corp.,
360 U.S. 411 (1959) 9

Southworth Machinery Co. v. F/V COREY PRIDE,
994 F.2d 37 (1st Cir. 1993) 30, 31
Texas A&M Research Found. v. Magna Transp. Inc.,
338 F.3d 394 (5th Cir. 2003) 5, 9, 30, 31
United States ex rel. Garrett v.
Midwest Constr. Co.,
619 F.2d 349 (5th Cir. 1980) 32
Vaughan v. N.J. Atkinson,
369 U.S. 527 (1962) 29, 34
Washington v. W.C. Dawson & Co.,
264 U.S. 219 (1924) 14
Wilburn Boat Co. v. Fireman's Fund Ins. Co.,
348 U.S. 310 (1955) 15
Winter Storm Shipping, Ltd. v. TPI,
310 F.3d 263 (2d Cir. 2002) 25
Yamaha Motor Corp., U.S.A. v. Calhoun,
516 U.S. 199 (1996) 22

STATUTES AND RULES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1332 3
28 U.S.C. § 1333 ..... 3, 35

Fed. R. Civ. P. 9(h) 24
Fed. R. Civ. P. 9 advisory committee's note 24

Ala. Code § 8-29-6 27
Del. Code Ann. Tit. 6, § 3506(e) 27
Georgia Prompt Pay Act (GPPA),
Ga. Code Ann. § 13-11-1 *et seq.* 3
Ga. Code Ann. § 13-11-2(1) 3

Ga. Code Ann. § 13-11-8 . . . . . 2, 3, 29
Mo. Rev. Stat. § 431.180(2) 27
Mont. Code Ann. § 28-2-2105 27
62 Pa. Cons. Stat. § 3939 28
Texas Gov't Code Ann. § 2251.043 28

OTHER MATERIALS

David P. Currie, *Federalism and the Admiralty: 'The Devil's Own Mess,'*
1960 SUP. CT. REV. 158 17
Mary Francis Derfner & Arthur D. Wolf,
COURT AWARDED ATTORNEY FEES (1998) . . . 28
Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause,*
75 TUL. L. REV. 1421 (2001) 18
Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?,*
47 LAW & CONTEMP. PROBS. 321 (1984) 28
Garrick B. Pursley,
The Structure of Preemption Decisions,
85 NEB. L. REV. 912 (2007) 10
David W. Robertson, *Displacement of State Law by Federal Maritime Law,*
26 J. MAR. L. & COM. 325 (1995) 18
John Paul Stevens,
The Life Span of a Judge-Made Rule,
58 N.Y.U. L. REV. 1 (1983) 14, 26
Ernest A. Young, *Preemption at Sea,*
67 G.W.U. L. Rev. 273 (1999) 18

Ernest A. Young, *The Last Brooding Omnipresence:* Erie Railroad Co. v. Tompkins *and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 St. Louis L. Rev. 1349 (1999) 18
Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469 (2004) 10

PETITION FOR WRIT OF CERTIORARI

Petitioner, Norfolk Dredging Company ("Norfolk"), respectfully prays that a writ of certiorari issue to review the January 21, 2010, judgment and opinion of the U.S. Court of Appeals for the Eleventh Circuit in this proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 21, 2010, *Misener Marine Constr. Co. v. Norfolk Dredging Co.*, is reported at 594 F.3d 832 (11th Cir. 2009), and reprinted at App. 1a.

The Eleventh Circuit opinion was issued in response to a an unpublished order from the U.S. District Court for the Southern District of Georgia of November 24, 2008, *Misener Marine Constr. Co. v. Norfolk Dredging Co.*, 2008 WL 5046174 (S.D. Ga. 2008), the relevant portions of which are reprinted at App. 20a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 21, 2010. App. 1a.

The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C.§ 1254(1) (2000).

STATUTORY PROVISION INVOLVED

This Petition raises the question of whether the judge-made federal maritime law impliedly preempts a state statutory enactment. The state statute at issue here is the attorneys' fees award provision of the Georgia Prompt Pay Act ("GPPA"), codified at Ga. Code Ann. § 13-11-8, the pertinent provisions of which are reprinted at App. 34a.

STATEMENT

1. Misener Marine Construction ("Misener") was contracted by the Georgia Ports Authority ("GPA") to demolish a dock and build a new dock at the Garden City Terminal near Savannah, Georgia. Misener subcontracted with petitioner, Norfolk Dredging Company ("Norfolk"), to remove material from the construction area outside the navigation channel of the Savannah River. While Misener's general contract with GPA expressly provided that Georgia law would control, Norfolk's subcontract with Misener contained neither a choice-of-law clause nor a provision for attorneys' fees in the event of a dispute between the parties. See App. 3a; 25a.

Norfolk began its work on the construction project in March 2004, and completed its work within the time specified by the subcontract. In July 2004, two mooring "dolphins" (or structures) adjacent to Norfolk's work area were pulled from the riverbed, causing a vessel to release from its secured position. Misener blamed Norfolk's work for the failure, and refused to pay any amounts owing to Norfolk on the

subcontract. See App. 4a.

2. a. Misener brought suit against Norfolk in the Southern District of Georgia for negligence, breach of the subcontract, and breach of warranty. These claims were filed pursuant to the district court's maritime jurisdiction. Norfolk answered Misener's complaint and counter-claimed for payment for the work, interest, and attorneys' fees. See App. 4a.

Norfolk's counterclaims invoked the Georgia Prompt Pay Act (GPPA), Ga. Code Ann.§ 13-11-1 *et seq*; App. 34a. The GPPA governs payments to contractors and subcontractors who "perform construction services," Ga. Code Ann.§ 13-11-2(1); App. 34a, and provides that "[i]n any action to enforce a claim under th[e Act], the prevailing party is entitled to recover a reasonable fee for the services of its attorney . . . ." Id. § 13-11-8; App. 34a. Even though it relied on the GPPA for its causes of action, Norfolk's counterclaim neither expressly invoked diversity jurisdiction (although it indicated that the parties were diverse based on their principal places of business), nor did it disclaim admiralty jurisdiction. See App. 4a &n.6; 24a.[1]

---

[1] Nevertheless, the parties stated in the proposed Pre-Trial Order before the district court that jurisdiction was based on "[a]dmiralty jurisdiction under 28 U.S.C.§ 1333 and diversity jurisdiction for the counterclaim and third-party claim under 28 U.S.C.§ 1332." Dist Ct. Dckt.175, at 17.

After more than a year of discovery and defense by Norfolk, Misener concluded that Norfolk was not at fault. In October 2005, Misener filed a voluntary dismissal of its claim against Norfolk. Norfolk then moved for summary judgment on its counterclaim against Misener for amounts owing on the subcontract, interest and attorneys' fees. See App. 5a; 21-22a.

b. In January 2006, the district court, Judge John Nangle presiding, entered summary judgment for Norfolk and granted Norfolk attorneys' fees under the GPPA, while reserving the precise calculation of fees to be awarded. See App. 5a; 22a. Judge Nangle ruled that there was no established federal rule regarding attorneys' fees in maritime cases, and the award of fees is not the type of issue that requires a uniform national rule. He thus held that recovery of attorneys' fees under the GPPA was not inconsistent with maritime law. See App. 5-6a; 22a.

Judge Nangle, however, passed away before issuing a final award of attorneys' fees to Norfolk. The case was reassigned to another district judge. See App. 6a; 20a n.1. Misener moved for reconsideration of the grant of attorneys' fees to Norfolk, as being inconsistent with the general maritime law which impliedly preempted the GPPA. The district court agreed in an order issued in November 2008. See App. 23-33a.[2]

---

[2] Also in this order were rulings concerning Norfolk's bill of costs, and whether the earlier judgment in Norfolk's favor had been fully satisfied. See App. 21, 33a. These matters were not appealed, and are not material to this petition.

Judge Edenfield ruled that, whether or not Norfolk's counterclaims were brought under diversity, they were still within admiralty jurisdiction. See App. 24a (citing *Pope & Talbot v. Hawn*, 346 U.S. 406, 410-11 (1953)). As a consequence, the decisive issue was whether the GPPA's award of attorneys' fees was "inconsistent with the substance of federal maritime law" or "frustrate[d] national interests in having uniformity in maritime law." App. 26a (quoting Eleventh Circuit precedents).

The district court recognized that attorneys' fees were generally not recoverable in admiralty. And while it acknowledged that there was an exception when such "are provided by the statute governing the claim," App. 26a (quoting *Natco Ltd. P'ship v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1993 (11th Cir. 2001)), the district court held that only the provision of a federal, not a state, statute would qualify under this exception. So even though the GPPA was "the statute governing the claim," it was irrelevant. See App. 27a.

The district court also declined to "supplement" the judge-made general maritime law by allowing the award of attorneys' fees pursuant to a state statute, finding the "reasoning persuasive" that such would "undermine the uniformity of maritime law." See App. 28, 30-32a (discussing *Texas A&M Research Found. v. Magna Transp. Inc.*, 338 F.3d 394 (5th Cir. 2003); and *Garan Inc. v. M/V AIVIK*, 907 F. Supp. 397 (S.D. Fla. 1995)).

c. Norfolk appealed the district court's denial of its attorneys' fees request, and the Eleventh Circuit affirmed on largely congruent grounds. App. 18a.

The court of appeals held that "the rule that each party generally bears its own attorneys' fees is a characteristic feature of maritime law [and that the] GPPA would directly contravene this established rule of maritime law." App. 7a. In reaching this conclusion, the Eleventh Circuit ruled that Norfolk's claims sounded in admiralty jurisdiction as involving "dredging a navigable waterway in a port that services international and national commerce" and as having "a direct effect on maritime services and commerce." App. 8a. Moreover, the court of appeals noted that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." App. 9a (quoting *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). Whether Norfolk's counterclaims also sounded in diversity was irrelevant. See App. 9a n.11 (citing *Pope & Talbot v. Hawn*, 346 U.S. 406, 411 (1953)).

The Eleventh Circuit also ruled that the GPPA did not qualify as a "statute[] governing the claim," within the meaning of established exceptions to the American Rule against award of attorneys' fees, because "[l]ogic and a proper reading of case law limiting 'statutes governing the claim' to federal statutes. Since the GPPA is not a federal statute it does not fall within this exception." App. 12a (footnote omitted).

Following this Court's teaching in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Eleventh Circuit turned to the nub of the appeal: whether the GPPA should be impliedly preempted because it "contravene[s] a characteristic feature of the general

maritime law [or] interfere[s] with the proper harmony and uniformity of maritime law." App. 13a. In "conclud[ing] that the principle that each party bear its own attorneys' fees is a characteristic feature of maritime law," the court of appeals did "not reach the question of proper harmony and uniformity." App. 14-15a.

The Eleventh Circuit acknowledged that there is a split in authority on the question of whether the American Rule on attorneys' fees is a "characteristic feature of maritime law," within the meaning of *Jensen*'s implied preemption doctrine. See App. 15-16a ("Norfolk argues, as some courts have ruled, that the rule that each party bear its own attorneys' fees is not a characteristic feature of maritime law, but is rather only a general federal procedural rule." (citations omitted)).

The court of appeals, in construing this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), agreed with Norfolk that the American Rule "did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a. Nevertheless, the Eleventh Circuit distinguished this Court's holding in *American Dredging* – that a state statute concerning *forum non conveniens* dismissals was not impliedly preempted because it was a procedural rule. The court of appeals instead held that the American Rule was a "principle of substantive maritime law," App. 17a, and that "[a]lthough we recognize the position of those who argue that the American Rule is not a characteristic feature of

maritime law, the long developed precedent of this Circuit and others cannot be so easily set aside." Id. "Therefore," the Eleventh Circuit concluded, "the GPPA's entitlement to attorneys' fees is in direct conflict with this principle of substantive maritime law. Thus, the GPPA cannot be incorporated into substantive maritime law." Id.

Judge Black of the Eleventh Circuit specially concurred with the panel decision. See App. 18a. Under the *Jensen* and *American Dredging* calculus, she, unlike the panel majority, would have held that "application of the GPPA would disrupt the proper harmony and uniformity of admiralty law, and thus . . . would not reach the issue of whether the American Rule is a characteristic feature of admiralty law." App. 18a. In further distinguishing this Court's holding in *American Dredging* and considering whether a state statutory rule affects "parties' conduct both inside and outside the courtroom," App. 18a, Judge Black observed that

> the American Rule is a substantive law that yields consistent and predictable results. Moreover, attorneys' fees can be a substantial portion of a party's recovery and thus could influence secondary behavior, such as a decision of where to sue. Other courts that have considered the application of state statutes providing for attorneys fees in maritime cases have also concluded uniformity is an important interest.

App. 19a (citing *Sosebee v. Rath*, 893 F.2d 54, 56-57 (3d

Cir. 1990); *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 406 (5th Cir. 2003)). Judge Black would thus have affirmed the district court's denial of attorneys' fees as being impliedly preempted by the general maritime law, but under slightly different premises than those offered by the panel majority's analysis of *Jensen* and *American Dredging*.

d. This timely petition follows.

REASONS FOR GRANTING THE PETITION

JENSEN SHOULD BE EITHER OVERRULED OR FURTHER CABINED

This petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred. . . ."). At issue here is the ongoing viability of a central – and controversial – tenet of our admiralty jurisprudence: that state statutes at variance with either "characteristic features" of the federal judge-made "general maritime law," or which "interfere[] with the proper harmony and uniformity of that law in international and interstate relations," are impliedly preempted. *Southern Pacific*

Co. v. Jensen, 244 U.S. 205, 215-16 (1917).

After nearly a century of discordant experience with implied preemption in admiralty, flowing from *Jensen* and its fractious progeny, it is finally time to either repudiate the doctrine altogether or to change jurisprudential course. This petition takes the exceptional step of asking the Court to re-examine *Jensen*, especially in light of this Court's ruling in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), with the object of overruling the implied preemption doctrine or substantially curtailing its effect.

A. The Time Has Come To Overrule *Jensen*.

Jensen's implied preemption doctrine[3] in admiralty was critiqued at its inception by members of this Court as being flawed in its premises and

---

[3] All members of the Court in *American Dredging* framed the doctrine in terms of preemption. See 510 U.S. at 445, 447 n.1 ("Petitioner's pre-emption argument was primarily based upon the principles established in *Jensen*, as repeated in the later cases. . . .") (citations omitted). See also id. at 458 (Souter J., concurring); 459-61 (Stevens, J., concurring); 466 (Kennedy, J., dissenting). What makes preemption "implied" under this doctrine, is, of course, the absence of any express act of Congress. That is why some scholars have referred to *Jensen*'s rule as a judicial expression of a Dormant Admiralty Clause. See, e.g., Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 922 n.61 (2007); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COMM. 469, 518-19 (2004).

reasoning. *Jensen* has produced nearly five generations of discordant progeny, in which the only consistent theme has been this Court's recognition of the implied preemption rule's inherent potential for incoherence and judicial "mischief." See *Kossick v. United Fruit Co.*, 365 U.S. 731, 742-43 (1961) (Frankfurter, J., dissenting). As recently as this Court's 1994 decision in *American Dredging*, the contours of the doctrine have been constrained, but with little success in giving guidance to lower courts as to precisely under what circumstances a state statute should be impliedly preempted as being in conflict with the judge-made federal general maritime law.

1. *Jensen* was born under peculiar circumstances. At issue was applying New York's workers' compensation statute to pay the widow of a longshoremen (Christen Jensen) who was killed on a gangplank a few feet offshore of Pier 49 in Manhattan. See 244 U.S. at 207-14. In striking down the statute, the *Jensen* Court, Justice McReynolds writing, intoned:

> Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.

. . . .

> In view of these constitutional provisions . . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. . . . [S]tate statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Id. at 215-16 (citations omitted). Because Jensen's injury occurred within admiralty jurisdiction, the Court applied the general maritime law, as a *constitutional* matter, so as to preempt a contrary state statutory scheme. *Jensen*'s conceptual similarity to the Court's now-discredited due process holding in *Lochner v. New York*, 198 U.S. 45 (1905), has not gone unnoticed. See *American Dredging*, 510 U.S. at 458 (Stevens, J., concurring).

The majority's holding in *Jensen* was vigorously

critiqued by the dissenters to that decision. Justice Pitney emphasized the lack of historic evidence for the proposition that the Framers intended Article III's Admiralty Clause as a free-standing grant of law-making power to the courts – judicial law-making that would automatically preempt state statutory and common law. See id. at 226, 228 (Pitney, J., dissenting). Additionally, Justice Pitney doubted whether there was any authority for *Jensen*'s broad holding. The *Jensen* majority's reliance, see id. at 215-16, on one earlier case, *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874), and its notion that the general maritime law was "a uniform law founded on natural reason and justice," id. at 572-73, was especially unsettling. It was in response to the majority's claim of jurisprudential superiority for a judge-made general maritime law that Justice Holmes's dissent in *Jensen* – which would presage this Court's later ruling in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) – made the observations that "judges do and must legislate, but they can only do so interstitially" and that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." Id. at 221, 222 (Holmes, J., dissenting).

Jensen's career in patrolling the boundaries of federalism in the maritime sphere immediately produced "conclusion[s]" that were later characterized, in substantial judicial understatement, as "remarkable." *American Dredging*, 510 U.S. at 458 (Stevens, J., concurring). When Congress attempted – not once, but twice – to statutorily overrule *Jensen* by

delegating to the states the authority to enact their own workers' compensation statutes with applicability to maritime workers, the Supreme Court struck down those federal statutes as violative of *Jensen*'s uniformity command. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924). The dissenters in *Knickerbocker Ice* and *Dawson*, Justices Holmes and Brandeis, called for *Jensen*'s overruling. See 253 U.S. at 167 (Holmes, J., dissenting); 264 U.S. at 236-37 ("These far[-]reaching and unfortunate results of the rule declared in [*Jensen*] cannot have been foreseen when the decision was rendered.") (Brandeis, J., dissenting). See also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 6-9 (1983) (considering relevance of *stare decisis* principles to calls for *Jensen*'s overruling).

It was only with the adoption of a uniform, federal compensation scheme for longshoremen that the *Jensen* rule was ostensibly satisfied. But even that did not quell confusion as to *Jensen*'s doctrinal reach in that realm of state regulation. In 1942, this Court held that the State of Washington could make an award under its compensation law to the widow of a worker drowned in a navigable river, and thus within admiralty jurisdiction, essentially creating a "twilight zone," in which workers could receive compensation under either state or federal schemes. See *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 256 (1942). Chief Justice Stone dissented and indicated that the majority should have overruled *Jensen*. See id. at 263 (Stone, C.J., dissenting). In concurring, Justice Frankfurter

called *Jensen* an "ill-starred decision," although candidly acknowledging that after twenty-five years, "[f]ederal and state enactments had accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings. . . ." Id. at 259 (Frankfurter, J., concurring).

2. If *Jensen*'s implied preemption doctrine in admiralty was "ill-starred" at birth and in its youth, its middle age was no less troubled. For starters, the doctrine appeared to be riddled with contradictions. Compare *Just v. Chambers*, 312 U.S. 383, 388 (1941) (allowing enforcement of a state wrongful death action), with *Pope & Talbot v. Hawn*, 346 U.S. 406, 409-10 (1953) (ruling against application of state law on injuries to stevedores). This Court's 1955 decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), cautioned that "it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty law." Id. at 313. This Court thus upheld the application of state law insurance provisions on breaches of warranties, and expressly declined the invitation to prescribe such rules itself. See id. at 314-17.

Likewise, Justice Frankfurter, writing for the Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), observed that

> [i]t is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.

> State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

Id. at 373-74.

And in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), this Court held that a provision of state law may not require that a maritime contract be in writing where admiralty law regards oral contracts as valid. Even so, the Court acknowledged these defects in the *Jensen* doctrine:

> Although the doctrines of the uniformity and supremacy of the maritime law have been vigorously criticized – see *Southern Pacific Co. v. Jensen*, 244 U.S. at 218 (dissenting opinion); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 [1943] – the qualifications and exceptions which this Court has built up to that imperative doctrine have not been considered notably

> more adequate. . . .[T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

Id. at 739 (citing, *inter alia*, David P. Currie, *Federalism and the Admiralty: 'The Devil's Own Mess,'* 1960 SUP. CT. REV. 158, 220 ("It cannot be gainsaid that the area of federalism and admiralty is plagued with inconsistencies.")). And, if that was not enough, Justice Frankfurter penned this dissent in *Kossick*:

> Certainly no decision in the Court's history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than [*Jensen*]. The mischief it has caused was due to the uncritical application of the loose doctrine of observing "the very uniformity in respect to maritime matters which the Constitution was designed to establish." [*Jensen*, 244 U.S. at 217]. The looser a legal doctrine, like that of the

> duty to observe "the uniformity of maritime law," the more incumbent it is upon the judiciary to apply it with well-defined concreteness. It can fairly be said that the *Jensen* decision has not been treated as a favored doctrine. Quite the contrary. It has been steadily narrowed in application. . . .

Id. at 742-43.

3. The "stead[y] narrow[ing]" of the *Jensen* doctrine has proceeded apace in its golden years, bringing us to the current juncture.[4] Material to the Eleventh Circuit's decision, and consideration of this petition, was the Court's 1994 ruling in *American Dredging*. At issue there was a Louisiana statute rendering unavailable the doctrine of *forum non conveniens* as a basis for dismissing suits brought in that state's courts. See 510 U.S. at 445-46. This Court concluded that such a state statute was not impliedly

---

[4] For whatever its value, academic criticism of *Jensen* has been legion. In addition to such classic works as Currie, *Federalism and the Admiralty* (cited above), more recent scholarship includes Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1451-63 (2001); David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995); Ernest A. Young, *Preemption at Sea*, 67 G.W.U. L. REV. 273 (1999); id., *The Last Brooding Omnipresence:* Erie Railroad Co. v. Tompkins *and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS L. REV. 1349 (1999).

preempted under *Jensen*.

In reaching that conclusion, though, the Court majority substantially altered the contours of the *Jensen* doctrine. Proceeding from the traditional bifurcation of *Jensen* preemption issues, the *American Dredging* Court, Justice Scalia writing, turned its attention to those state statutes that might arguably "work[a] material prejudice to [a] characteristic feature[] of the general maritime law." *Jensen*, 244 U.S. at 216. The *American Dredging* Court held that, in order for a state statute to be impliedly preempted as infringing a "characteristic feature" of maritime law, the rule being affected must have either "originated in admiralty [or have] exclusive application there." 510 U.S. at 450. Since *forum non conveniens* neither originated in admiralty (its origins were traceable to Scots estate law, see id. at 449) nor had exclusive application there (as a general rule of venue, see id. at 450, 453), it was not a "characteristic feature of the general maritime law," within the meaning of *Jensen*'s implied preemption rule.

Jensen's second prong – whether a state statute disrupted the "proper harmony and uniformity" of the general maritime law, *Jensen*, 244 U.S. at 216 – presented a thornier issue for the *American Dredging* Court. Justice Scalia acknowledged that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." 510 U.S. at 452. Notwithstanding, the Court concluded that Louisiana's *forum non conveniens*

statute did not offend the maritime law's harmony and uniformity because it embodied a "procedural rule" and not a "substantive right," id. at 453-54, and was "not a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." Id. at 454. Indeed, the Court questioned whether *forum non conveniens* even amounted to much of a rule "about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued." Id. at 455. The Court acknowledged that the process/substance distinction was elusive, and that certain doctrines (such as burdens of proof) have changed character over the years. See id. at 453-54; see also id. at 457-58 (Souter, J., concurring) ("in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive pre-emption analysis.").

The *American Dredging* Court was hardly effusive in its praise for *Jensen*. In response to Justice Stevens' call for *Jensen*'s overruling, see id. at 458 (Stevens, J., concurring), the majority merely noted that "[s]ince we ultimately find that the Louisiana law meets the standards of *Jensen* anyway, we think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation." Id. at 447 n.1. Nor did the Court majority much dispute Justice Stevens' critique that "*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation. . . without any firm grounding in constitutional text or principle." Id. at 459 (Stevens, J., concurring), 461

(questioning whether *Jensen* has any originalist basis).

Indeed, the majority appeared to agree with Justice Stevens' characterization of the *Jensen* maritime preemption doctrine as a "patchwork." Id. at 460 (Stevens, J., concurring); see also id. at 452 ("It would be idle to pretend. . . ."). Nothing in the *American Dredging* majority suggests that *Jensen*'s "strong preemption doctrine" is necessitated by the demands of protecting contemporary maritime commerce from the ravages of state protectionism, id. at 461 (Stevens, J., concurring), or could be as effectively accommodated by other constitutional means, such as Commerce Clause and Due Process Clause jurisprudence. See id. at 461-62 (Stevens, J., concurring). Justice Stevens offered this re-conceptualization of the *Jensen* doctrine:

> we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law, or, perhaps, whether federal maritime rules, while not directly inconsistent, so pervade the subject as to preclude application of state law. We should jettison *Jensen*'s special maritime pre-emption doctrine and its abstract standards of "proper harmony" and "characteristic features."

Id. at 461 (Stevens, J., concurring).

In contrast, the *American Dredging* dissenters (Justice Kennedy, joined by Justice Thomas) offered a robust justification for *Jensen*, and would have ruled

that Louisiana's *forum non conveniens* statute was impliedly preempted. See id. at 462-70. Even so, the Court's decisions after *American Dredging* have acknowledged that guidance is still lacking in this realm. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995) ("exercise of federal admiralty jurisdiction does not result in automatic displacement of state law."). In its 1996 decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, the Court regretfully noted that

> The federal cast of admiralty law, we have observed, means that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959). Our precedent does not precisely delineate that scope. . . . We attempt no grand synthesis or reconciliation of our precedent today.

516 U.S. 199, 210 n.8 (1996) (citing and quoting *American Dredging*, 510 U.S. at 452).

4. The decision for which review is sought here amply illustrates the cost of this Court perpetuating a "patchwork" doctrine which embraces "abstract standards" and "[in]discernible" distinctions, apparently impervious to "precise[] delineat[]ion." The Eleventh Circuit's opinion pronounces a formidably expansive vision of federal admiralty jurisdiction and a concomitant assertion of the supremacy of the federal

judge-made general maritime law, even at the expense of legitimate state statutory enactments.

Even before launching into its *Jensen* analysis, the court of appeals pronounced a crucial premise to its holding: "with admiralty jurisdiction comes the application of substantive maritime law." App. 9a (quoting *E. River S.S. Co. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). The court of appeals was apparently heedless of this Court's caution in *Grubart*, 513 U.S. at 545 ("exercise of federal admiralty jurisdiction does not result in automatic displacement of state law"), and this Court's modulated treatment of admiralty jurisdiction over maritime contracts. See *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004) (whether a contract falls into admiralty jurisdiction depends "upon the nature and character of the contract [and] whether it has reference to maritime service or maritime transactions") (citations omitted). The Eleventh Circuit held that Norfolk's subcontract was within admiralty jurisdiction, notwithstanding that the general contract for the construction was governed by Georgia law and that Norfolk removed material outside the Savannah River's navigable channel. See App.7-10a.

Perhaps just as significantly, the court of appeals held as a preliminary matter that it was irrelevant that Norfolk's counterclaims sounded in state law (under the Georgia Prompt Pay Act (GPPA)) and were brought under diversity jurisdiction. See App. 9a n.11. That they were also encompassed within admiralty jurisdiction sufficed for the all-encompassing application of the federal general maritime law, as per

this Court's ruling in *Pope & Talbot*, 346 U.S. at 411. But it is questionable whether this holding of *Pope & Talbot* survived the Court's ruling in *Romero*, see 358 U.S. at 363, 371, and (more importantly) the 1966 adoption of Fed. R. Civ. P. 9(h), which requires the designation of maritime claims in order to distinguish them from those brought under diversity or other jurisdictional bases. See Fed. R. Civ. P. 9 advisory committee's note (1966 amendment).

In deciding that the American Rule against the award of attorneys' fees was a "characteristic feature" of the general maritime law, the court of appeals had to first acknowledge, in accordance with *American Dredging*, that "the American Rule did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a. This should have ended the "characteristic feature" analysis. Instead, the Eleventh Circuit went on to hold that the "GPPA is distinguishable from the Supreme Court's holding in *American Dredging*" because the GPPA is a "substantive law." App. 17a. But the process/substance distinction goes to *Jensen*'s second prong, "harmony and uniformity," and not to a "characteristic feature" of the maritime law.

The Eleventh Circuit's analytic confusion as to *American Dredging*'s distinct treatment of "characteristic features" and "harmony and uniformity" is no mere semantic mis-step.[5] The Eleventh Circuit

---

[5] Most courts of appeal, post-*American Dredging*, have explicitly sought to avoid analytically "collapsing" *Jensen*'s

elided this Court's requirement that a state statute "materially prejudice[]" a "characteristic feature," by simply concluding that there was a "direct conflict" between the American Rule and the GPPA. App. 17a. By effectively merging *Jensen*'s two prongs, the panel majority belied its assertion that it did "not reach the question of proper harmony and uniformity." App. 15a. It most certainly did.

Nor did Judge Black's special concurrence cure this analytic defect. She would have held that the American Rule "is a substantive law that yields consistent and predictable results. . . . and thus could influence secondary behavior, such as a decision of where to sue." App. 19a. But this Court's ruling in *American Dredging* required that for a state statute to be impliedly preempted it must interfere with the proper harmony and uniformity of the maritime law inasmuch as "primary conduct" was concerned – "how [maritime actors] manage their business and what precautions to take." 510 U.S. at 454. The *American Dredging* Court's discussion of "secondary conduct," id. at 455, was meant to be cautionary: even if *forum non conveniens* rules influenced "secondary conduct" (which the Court doubted), they would not necessarily qualify

---

two prongs. See, e.g., *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 279 n.12 (2d Cir. 2002), rev'd on other grounds, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, (2nd Cir. 2009); *In re Exxon Valdez*, 270 F.3d 1215, 1250-51 (9th Cir. 2001); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 627 (1st Cir. 1994) (referring to *Jensen*'s "prong[s]").

as preemptive under *Jensen*.[6] If the Eleventh Circuit's combined treatment of "primary" and "secondary" conduct is countenanced, it would mean that virtually any rule of conduct would satisfy *Jensen*'s "harmony and uniformity" prong.

5. *Jensen* has reached the end of its life as a judge-made rule. See Stevens, *supra*, 58 N.Y.U. L. Rev. at 6-9. Petitioner is mindful of the understandable reluctance this Court would exercise in considering whether to overrule a precedent so apparently central to admiralty and federalism jurisprudence. Nevertheless, petitioner is prepared to argue that *Jensen* was birthed under false historical and constitutional assumptions, which have been since fundamentally undermined by this Court's *Erie* ruling rejecting the application of a federal general common law in diversity actions. See *Erie R.R.*, 304 U.S. at 78.

Jensen's implied preemption calculus, even as re-fashioned in *American Dredging*, is also unsustainable in practice, leaving lower courts "without a reliable compass for navigating maritime pre-emption problems." *American Dredging*, 510 U.S. at 459 (Stevens J., concurring). Implied maritime preemption

---

[6] Two of the three courts of appeals to consider the issue have concluded that *American Dredging*'s emphasis is on "primary conduct." See, e.g., *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 49 (2d Cir. 1996); *Ballard Shipping*, 32 F.3d at 629; but see *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 669 (9th Cir. 1997) (considering both primary and secondary conduct under implied preemption analysis).

– as a reflection of some sort of constitutionalized "admiralty exceptionalism" – is no longer necessary. There are other, less constitutionally-invasive, means available to ensure the coherence of maritime law than *Jensen*'s overweening rule of implied preemption.

American Dredging predicted that a time would come where the Court would be asked to reconsider *Jensen*. See 510 U.S. at 447 n.1. That day has arrived.

B. Even If This Court Is Disinclined To Overrule *Jensen*, Review Should Be Granted As To Whether A State Statutory Award of Attorneys' Fees Is Impliedly Preempted.

Quite apart from its handling of *Jensen*'s implied preemption analysis, the Eleventh Circuit's specific ruling – that the American Rule was a "characteristic feature" of the general maritime law and was, therefore, preemptive of Georgia's Prompt Pay Act – extends the doctrine well-beyond its current contours and (as the court of appeals itself acknowledged, see App. 15-16a & n.19, 17a) conflicts with the decisions of other courts.[7]

---

[7] Georgia is not alone in enacting an award of attorneys' fees to the prevailing party in construction disputes. See, e.g., Ala. Code § 8-29-6; Del. Code Ann. tit. 6, § 3506(e); Mo. Rev. Stat.§ 431.180(2); Mont. Code Ann.§ 28-2-2105; 62 Pa. Cons. Stat.§ 3939; Tex. Gov't Code Ann.§ 2251.043.

The court of appeals' analysis would, of course, extend to preempt *any* state statutory grant of attorneys' fees in an action denominated as maritime in character. For

1. As already discussed, see *supra* at 24-26, the court of appeals muddled the *Jensen/American Dredging* analysis by essentially collapsing *Jensen*'s two prongs. Whatever the true character of the "American Rule" on the award of attorneys' fees, it – as the Eleventh Circuit declared – "did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a.[8] Nevertheless, both the

---

a dated, yet exhaustive, tally of state fee-shifting statutes, see Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 328-45 (1984) (documenting 2000 state fee-shifting provisions). See also 1 Mary Francis Derfner & Arthur D. Wolf, COURT AWARDED ATTORNEY FEES, ch. 5, *Statutory Exceptions to the American Rule* (1998).

[8] Petitioner does not intend to subvert this Court's teachings in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); and *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), both relied upon by the court of appeals in its ruling below. See App. 15a n.18. But both decisions acknowledged that the American "Rule" is really a presumption, and that attorneys' fees can certainly be awarded where there is a "statute . . . providing therefor." 386 U.S. at 717. Obviously, the question raised here is whether a *state* statutory grant of attorneys' fees would qualify as an exception to the American Rule. The Eleventh Circuit conclusively answered "no." See App. 12a.

In the specific context of maritime cases, this Court has already acknowledged at least one exception to the American Rule: where there is misbehavior by a litigant. See *Vaughan v. N.J. Atkinson*, 369 U.S. 527, 530-31 (1962). The Eleventh Circuit held that Norfolk had not asserted

panel majority and special concurrence declared the American Rule as "substantive," App. 17a, 19a, and thus preemptive under *Jensen*, whether under the "characteristic feature" or "harmony and uniformity" prongs.

The Eleventh Circuit's conclusion that the American Rule is "substantive" found support only in the special concurrence's assumption (see App. 19a) that, in *American Dredging*, rules going to "secondary conduct" were impliedly preempted under *Jensen*. But that was not this Court's holding in *American Dredging*, and the *Jensen* analysis should not be so extended as to cover rules of "secondary conduct."

2. Given the number of state statutes that allow for the grant of attorneys' fees to prevailing parties (irrespective of bad faith conduct), see *supra* at 27 n.7, lower courts are split on whether such statutes are impliedly preempted under *Jensen*. The Eleventh Circuit acknowledged this division. See App. 15-16a & n.19, 17a.

Three courts of appeals decisions support the Eleventh Circuit's conclusion. See *Sosebee v. Rath*, 893 F.2d 54 (3d Cir. 1990); *Southworth Machinery Co. v. F/V COREY PRIDE*, 994 F.2d 37 (1st Cir. 1993); *and Texas A&M Research Foundation v. Magna Transp, Inc.*, 338 F.3d 394 (5th Cir. 1993). But the *Jensen* analysis in these decisions is conclusory. In *Sosebee*, a

---

that Misener's conduct amounted to bad faith. See App. 12a. That still leaves Norfolk's claim as of right under the GPPA as the "prevailing party" in the proceeding. Ga. Code Ann.§ 13-11-8; App. 34a.

pre-*American Dredging* case, the First Circuit merely held that "[t]here is a strong interest in maintaining uniformity in maritime law. This interest would be undermined if the availability of attorneys' fees depended upon where the plaintiff filed suit." 893 F.2d at 56-57.

In *Southworth*, an opinion filed after *American Dredging* but where this Court's decision in that case is not considered, the First Circuit offered this approach:

> State statutes providing for attorney's fees may sometimes be given effect in admiralty cases, notably, where the attorney's fees are awarded incident to a dispute that is not normally a subject of maritime law. For example, in *Pace v. Insurance Company of North America*, 838 F.2d 572, 578-79 (1st Cir. 1988), we held that maritime law did not preempt a Rhode Island cause of action allowing recovery of damages and attorney's fees for an insurer's bad faith refusal to pay or settle claims; the refusal to settle claims is normally left untouched by maritime law. . . .
>
> Turning to the case at hand, Southworth's liability under [state law] was not predicated on any ground novel to or unaddressed by maritime law. Rather, Southworth was found liable as a result of its breach of its express warranty for parts and workmanship incident to the repair of a ship, a standard contractual

> breach to which maritime law has always applied. The conduct found to violate [state law] falls squarely within the focus of existing maritime law, and [state law's] attorney's fee provision, being inconsistent with maritime law, cannot be applied in this case.

Id. at 41-42 (citations omitted). *Southworth*'s citation to *Pace* is significant inasmuch as *Pace* reflects a line of cases where state fee-shifting statutes in the insurance context were applied to marine insurance disputes, and held consistent with the *Jensen* doctrine. See also *INA of Texas v. Richard*, 800 F.2d 1379, 1381 (5th Cir. 1986); and *All Underwriters v. Weisberg*, 222 F.3d 1309, 1315 (11th Cir. 2000) (holding to the same effect as *Pace*), which the court below distinguished as being a marine insurance case and thus not relevant to wider maritime disputes. See App. 11a n.13.

The Fifth Circuit in *Texas A&M* merely cited *Southworth* and *Sosebee* in reaching its holding that "the general rule of maritime law that parties bear their own costs, coupled with the need for uniformity in federal maritime law, precludes the application of state attorneys' fees statutes. . . ." 338 F.3d at 406. The Fifth Circuit did not conduct its own review of whether the American Rule was substantive or procedural under the *American Dredging* analysis, or whether it went to primary or secondary conduct. Just as significantly, *Texas A&M* did not distinguish the Fifth Circuit's earlier decision in *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349 (5th Cir. 1980), which held that attorneys' fees were recoverable under

a Texas statute for breach of a dredging contract in a diversity case. See id. at 352-53. Despite the Eleventh Circuit's attempt to discount *Garrett*'s relevance,[9] see App. 10a n.12, *Garrett* should be counted as a court of appeals decision supporting the application of a state attorneys' fee statute in claims brought under concurrent diversity and admiralty jurisdiction.

As recognized by the Eleventh Circuit, see App. 16a n.19, the most cogent decision explaining why the American Rule is a procedural rule having no effect on

---

[9] *Garrett* certainly involved a contract for dredging in proximity to navigable waters, see 619 F.2d at 350-51 (sketch illustration of the site). If the Eleventh Circuit was correct in its conclusion that the dredging operation in *Garrett* did not fall within admiralty jurisdiction, see App. 10a n.12, one might legitimately question how Norfolk's work outside the navigable channel in this case does.

In *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14 (2004), this Court held that whether a contract falls into admiralty jurisdiction depends "upon the nature and character of the contract [and] whether it has reference to maritime service or maritime transactions." Id. at 23-25 (citations omitted). The Eleventh Circuit's holding leads to a discordant result -- whittling away at *Kirby*, if not ignoring it altogether. Had Misener performed the dredging work itself under the general contract (regardless of choice of law in the contract), federal maritime law would not have barred Misener from collecting attorneys' fees under the GPPA because the "nature and character" of the work was dock construction, which, like vessel construction, is outside admiralty jurisdiction. Under the court of appeals' holding, the opposite result obtains when a subcontractor performs the exact same work.

either primary or secondary conduct is the Alaska Supreme Court's opinion in *Hughes v. Foster Wheeler Co.*, 932 P.2d 784 (Alaska 1997). Rigorously following this Court's calculus in *American Dredging*, see 932 P.2d at 787-91, the Alaska Supreme Court first rejected the notion that the American Rule was a "characteristic feature" of the maritime law because it neither originated in admiralty nor had exclusive application there. See id. at 788-89. As for "proper harmony and uniformity," the Alaska Supreme Court, in an abundance of caution, considered both whether the American Rule affected primary and secondary behavior of maritime actors:

> With respect to primary behavior, it is highly doubtful that parties – either mariners or owners of vessels – will alter their business regimes or take different precautions due to the risk that partial attorney's fees and costs can be awarded in favor of the prevailing party against the losing party. Owners of vessels already have sufficient reason to take precautions to safeguard mariners working on their vessels, since they can and are sued for unseaworthiness, personal injury, wrongful death, and other causes of action when mariners are injured on-board. The fact that [Alaska] Civil Rule 82 would allow a vessel owner, if successful on the merits, to recoup partial attorney's fees and costs is not a sufficient incentive for shipowners to scrimp on safety or change their business

> management techniques. Similarly, the prospect that mariners might recover partial attorney's fees and costs if they successfully prosecute a suit hardly seems to be sufficient incentive for them to carry out their duties in such a way that would cause them to suffer injury.
>
> The analysis of secondary behavior is more involved. First, Civil Rule 82 will not substantially affect where plaintiffs file suit. In all jurisdictions there is a chance that attorney's fees and costs will be awarded. A plaintiff in an admiralty suit who sues in courts of the State of Alaska knows that there is a probability that partial attorney's fees and costs will be awarded to the defendant if the defendant prevails. A plaintiff who files suit in another jurisdiction (federal or state) knows only that, pursuant to *Vaughan* [*v. N.J. Atkinson*, 369 U.S. 527 (1962)], there is a possibility that attorney's fees will be awarded in the exercise of the admiralty court's equity power. While the likelihood of a fee award is higher in Alaska than in other jurisdictions, the difference is not so great that it would influence plaintiffs in their decision concerning where to file suit.

Id. at 790-91. See also *Paul v. All Alaskan Seafoods, Inc.*, 24 P.3d 447, 456-58 (Wash. App. 2001) (reaching the same conclusion as *Hughes*).

3. As the court below acknowledged, see App. 15-16a & n.19, 17a, there is a division in precedents on whether state attorneys' fee statutes are impliedly preempted under *Jensen*. If the marine insurance cases are not distinguished away, the balance of authority may well tip against the Eleventh Circuit's holding. Certainly, the greater weight should be afforded to those opinions, like the Alaska Supreme Court in *Hughes*, that faithfully sought to apply this Court's analysis in *American Dredging*.

Given the plethora of state fee-shifting enactments, see *supra* at 27 n.7, and the variety of contexts in which they might be applied to maritime disputes, the likelihood that this feature of *Jensen* will continue to be litigated in both federal courts and state courts (hearing maritime cases under the "saving to suitors" proviso of 28 U.S.C.§ 1333) is quite high. Even if this Court declines the invitation to pass on the wider question of *Jensen*'s continued viability, it should still grant review to resolve this aspect of the proper federalism balance to be struck in maritime cases.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
E-Mail lawdjb@emory.edu

JAMES L. CHAPMAN, IV
W. RYAN SNOW
GUILFORD D. WARE
Of Counsel
Crenshaw, Ware & Martin, P.L.C.
1200 Bank of America Center
Norfolk, Virginia 23510
Phone (757) 623-3000

Attorneys for Petitioner

March 24, 2010

Appendix

United States Court of Appeals
for the Eleventh Circuit

No. 09-10083

MISENER MARINE CONSTRUCTION, INC.,
Plaintiff-Counter-Defendant-
Counter-Claimant-Appellee,
v.
NORFOLK DREDGING COMPANY,
Defendant-Counter-Claimant-Cross-Defendant-
Cross-Claimant-Appellant,
Travelers Casualty and Surety Company of America,
Defendant-Counter-Defendant-Appellee,
General Gas Carrier Corporation,
Defendant-Cross-Claimant-Cross-Defendant-
Counter-Defendant,
LPG/C STEVEN N,
Defendant-Cross-Claimant-Counter-Defendant,
PCS Phosphate Company, Inc., PCS Nitrogen
Fertilizer, L.P.,
Defendants-Counter-Claimants-Third-Party
Plaintiffs,
Georgia Ports Authority, Third-Party
Defendant-Counter-Claimant-Counter-Defendant-
Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

January 21, 2010

Before BLACK, WILSON and COX, Circuit Judges.

WILSON, Circuit Judge:

This case concerns whether the prevailing party in a dispute arising from a dredging contract is entitled to collect attorneys' fees. Misener Marine Construction, Inc. subcontracted Norfolk Dredging Company to dredge sections of the Savannah River, a navigable waterway, as part of a larger construction project at the Port of Savannah (the "Port"). After problems at the construction site Misener sued Norfolk, and Norfolk counterclaimed. Norfolk prevailed in both Misener's lawsuit and its counterclaims. Norfolk contends that it is entitled to attorneys' fees pursuant to the Georgia Prompt Pay Act ("GPPA").[1] After reading the briefs, examining the record, and considering each party's oral argument, we affirm the order of the district court denying Norfolk recovery of attorneys' fees under the GPPA. We hold that the American Rule barring the shifting of attorneys' fees is a characteristic feature of

[1] The GPPA is a chapter of the Georgia Code that regulates construction contracts and payments between contractors and subcontractors. O.C.G.A. § 13-11-1 et seq. Section 8 of the GPPA provides for the recovery of attorneys' fees by a prevailing party. O.C.G.A. § 13-11-8 ("In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be.").

maritime law,[2] which governs the interpretation of the contract in this case. The GPPA is in direct conflict with this principle of maritime law. Moreover, Norfolk was free to contract for attorneys' fees but chose not to.

I. FACTS AND PROCEDURAL HISTORY

The Port of Savannah is the "fourth-largest container port in the United States and the largest single-terminal operation in North America."[3] It is a gateway to and from the Atlantic Ocean and serves as "a major distribution hub to and from a 26-state region – fully 75% of the U.S. population."[4] Misener was contracted by the Georgia Ports Authority to demolish a dock and build a new dock at the Port. As part of this project, Misener subcontracted Norfolk to dredge parts of the Savannah River in the Port. Norfolk drafted a two-page dredging contract that was subsequently signed by Misener. The contract did not contain a choice-of-law provision. And, most importantly, it did not contain a provision providing for attorneys' fees.

[2] The terms "maritime law" and "admiralty law" are used interchangeably throughout our opinion.

[3] Georgia Ports Authority, http:// www. gaports. com/ Default. aspx? tabid= 122 (last visited Nov. 24, 2009).

[4] Savannah Economic Development Authority, http:// seda. org (follow "Industries & Companies" hyperlink; then follow "Port Related/ Distribution" hyperlink) (last visited Nov. 24, 2009)

Norfolk started the dredging work on March 23, 2004 and completed it within the time specified by the contract. The area in which Norfolk was dredging was close to two temporary mooring dolphins.[5] On July 12, 2004 these mooring dolphins pulled partially from the riverbed, causing the vessel the STEVEN N to release from its secured position. Misener blamed Norfolk's dredging for the failure and brought suit in the Southern District of Georgia for negligence, breach of the dredging contract, and breach of warranty.

Misener's complaint stated that the lawsuit was filed pursuant to the district court's maritime jurisdiction. Norfolk answered Misener's complaint and counterclaimed for payment for the dredging work, interest, and attorneys' fees pursuant to the GPPA. In pleading its counterclaim Norfolk stated that the district court had jurisdiction, but did not explicitly state the basis for jurisdiction.[6]

Upon further investigation into the failure of the mooring dolphins, Misener determined that Norfolk

[5] Mooring dolphins are man-made structures that rise above the water and are used for various purposes such as securing vessels, supporting warning signs, or protecting nearby piers.

[6] Norfolk asserts on appeal that it filed its counterclaim under diversity jurisdiction, but the only indication of this is paragraphs two, three, and four of Norfolk's Counterclaim section of its Amended Answer, wherein it states the principal place of business of each party to the action.

was not responsible. Misener filed a voluntary dismissal of its claim against Norfolk on October 6, 2005. Norfolk moved for summary judgment on its claim for payment, interest, and attorneys' fees on November 8, 2005.

On January 6, 2006, the district court entered summary judgment for Norfolk, granting Norfolk attorneys' fees pursuant to the GPPA, and reserving ruling on the amount of attorneys' fees to be awarded. The summary judgment order held that this Court's precedent allowed state laws dealing with attorneys' fees to supplement maritime law.[7] The district court judge ruled that there is not an established federal rule regarding attorneys' fees in maritime cases, and attorneys' fees is not the type of issue that requires a uniform national rule. Thus, the recovery of attorneys'

[7] The order cited three opinions to support this proposition: *All Underwriters v. Weisberg*, 222 F.3d 1309, 1313-15 (11th Cir. 2000) (in matters of maritime insurance, state law controls, and so prevailing party was allowed to recover attorneys' fees under state statute); *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1251-52 (11th Cir. 2000) (prevailing party in maritime insurance dispute was allowed to recover attorneys' fees where provision for recovery of attorneys' fees was included in the contract); and *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349, 353 (5th Cir. 1980) (prevailing party in a dredging dispute was allowed to collect attorneys' fees pursuant to a state statute). As we discuss later, the initial district court order and Norfolk have misconstrued these holdings in such a way as to incorrectly interpret our precedent.

fees under the GPPA was not inconsistent with maritime law, and the GPPA should supplement maritime law. The district court judge passed away prior to issuing a ruling setting the amount of attorneys' fees.

A new district court judge was subsequently assigned to the case. In determining the amount of attorneys' fees Norfolk was entitled to recover, the new judge found that the GPPA conflicted with a general principle of maritime law, that each party bears its own attorneys' fees. The district court entered an order denying Norfolk attorneys' fees under the GPPA. Norfolk appeals this order.[8]

II. STANDARD OF REVIEW

We review the district court's application of maritime law de novo. *All Underwriters v. Weisberg*, 222 F.3d 1309, 1310 (11th Cir. 2000) (citation omitted).

III. DISCUSSION

Norfolk presents several arguments all aimed at recovery of attorneys' fees pursuant to the GPPA. First, Norfolk argues that this case arises under diversity jurisdiction and Georgia law, i.e. the GPPA, should apply. The dredging contract at issue, however, makes this case one of maritime jurisdiction and thus the district court properly applied substantive maritime

[8] We have jurisdiction over final orders of the district courts pursuant to 28 U.S.C. § 1291.

law. Second, Norfolk contends that our precedent supports the application of the GPPA to dredging cases. This argument is based on a misinterpretation of our precedent and has no merit. Third, Norfolk argues that the GPPA can supplement substantive maritime law because the bar against shifting attorneys' fees is not a characteristic feature of maritime law and the GPPA will not contravene the uniformity interests of maritime law. We find the rule that each party generally bears its own attorneys' fees is a characteristic feature of maritime law. The GPPA would directly contravene this established rule of maritime law. Further, a clearly established exception exists wherein Norfolk was free to contract for the indemnification of attorneys' fees. Norfolk chose not to include such a provision in the contract and we will not give Norfolk a second bite at the apple by way of the GPPA.

A. Substantive Maritime Law Controls This Case

The federal courts have primary jurisdiction of maritime issues.[9] To determine whether a contract falls within maritime jurisdiction we look to "the

[9] "The judicial Power shall extend to all Cases ... of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2, cl. 1. Congress codified this Constitutional grant of jurisdiction as follows: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333.

subject-matter, the nature and character of the contract ... the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions." *N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 223 (1919). In *Hall Brothers* the Supreme Court held that an agreement to repair a ship, even though on a dry dock, was a maritime contract. Id. at 129, 39 S.Ct. at 224. "In sum, we look to whether the substance of the contract at issue in the dispute – without regard to the identity of the parties – is reasonably necessary to the conduct of maritime commerce." *Ambassador Factors v. Rhein-, Maas-, Und See-Schiffahrtskontor GmBH*, 105 F.3d 1397, 1399 (11th Cir. 1997) (footnote omitted).

The primary objective of the contract between Norfolk and Misener was dredging a navigable waterway in a port that services international and national commerce. There is no doubt that the work contracted for and performed by Norfolk had a direct effect on maritime services and commerce. Further, the Supreme Court has previously held that dredging is traditionally a maritime activity.[10] Norfolk's dredging

[10] See *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 495-97, 125 S.Ct. 1118, 1127-29 (2005) (dredge was a vessel and thus fell under the Longshore and Harbor Workers' Compensation Act, a maritime statute); *Ellis v. United States*, 206 U.S. 246, 259, 27 S.Ct. 600, 603 (1907) (citation omitted) (dredges are vessels and fall "within the admiralty jurisdiction of the United States"); see generally *Jerome B.*

(continued...)

contract, and the dispute arising therefrom, falls within the federal courts' maritime jurisdiction.[11]

"With admiralty jurisdiction comes the application of substantive admiralty law." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 106 S.Ct. 2295, 2298-99 (1986). "Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." Id. at 864-65, 106 S.Ct. at 2299 (footnote omitted). While Congress is empowered to pass laws regarding maritime activities, a large part of the body of substantive maritime law has arisen from common law

[10](...continued)
Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 540, 115 S.Ct. 1043, 1051 (1995) (lawsuit concerning a fixed barge on the Chicago River fell under maritime jurisdiction because "repair or maintenance work on a navigable waterway performed from a vessel" was substantially related to traditional maritime activity).

[11] Norfolk has argued that they pleaded diversity jurisdiction in their counterclaim, thus Georgia law and the GPPA should apply. Even if this case were filed under diversity, substantive maritime law would still apply. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411, 74 S.Ct. 202, 206 (1953) (finding that substantive maritime law applied in a maritime tort even though the suit was filed under diversity jurisdiction). "[T]he substantial rights of an injured person are not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket." Id.

principles of the Supreme Court. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314, 75 S.Ct. 368, 370 (1955). "And States can no more override such judicial rules validly fashioned than they can override Acts of Congress." Id.

B. Maritime Law Generally Requires That Each Party Bear Its Own Attorneys' Fees

The law in this Circuit regarding attorneys' fees in maritime disputes is clear.[12] "The prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course." *Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1193 (11th Cir. 2001) (citing *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980) ("Absent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to

[12] Norfolk futilely cites *United States ex. rel. Garrett v. Midwest Construction Co.*, 619 F.2d 349, 353-54 (5th Cir. 1980). (Decisions issued by the Fifth Circuit prior to October 1, 1981 are binding precedent in this Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).) *Garrett* applied a state attorneys' fees statute to a dispute arising from a dredging contract. *Garrett*, however, was decided under diversity jurisdiction, rather than maritime jurisdiction, and the opinion made no mention of substantive maritime law. *Garrett* did not address the issue presented to us in this case, namely whether a state statute providing for the recovery of attorneys' fees is applicable in a dispute arising under maritime law. Thus, *Garrett* provides no guidance to the conclusion we reach in this case.

an award for attorneys' fees.")); see also *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1250 (11th Cir. 2000) ("A party is not entitled to attorney's fees in an admiralty case unless fees are statutorily or contractually authorized."). There are exceptions to the general rule precluding recovery of attorneys' fees. See *Natco*, 267 F.3d at 1196 (attorneys' fees were properly awarded in a maritime case where a specific contractual provision was interpreted to provide the recovery of attorneys' fees). Attorneys' fees will be awarded to the prevailing party in maritime cases if: "(1) they are provided by the statute governing the claim, (2) the nonprevailing party acted in bad faith in the course of the litigation, or (3) there is a contract providing for the indemnification of attorneys' fees." Id. at 1193. Absent one of these exceptions, this Court will not award the prevailing party attorneys' fees.[13]

[13] Our decision in *All Underwriters v. Weisberg*, 222 F.3d 1309 (11th Cir. 2000), does not conflict with the rule that each party generally bears its own attorneys' fees. *Weisberg* awarded attorneys' fees to the prevailing party in a maritime insurance dispute pursuant to a state statute. 222 F.3d at 1315. However, the ruling in *Weisberg* followed the precedent of *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-17, 75 S.Ct. 368, 371-72 (1955), wherein the Supreme Court ruled that states have a strong interest in the regulation of insurance, including maritime insurance. *Weisberg* did not establish a precedent that attorneys' fees are generally recoverable in maritime disputes. 222 F.3d at 1313-15. The determinative issue in *Weisberg* was insurance, not attorneys' fees. Id.

Norfolk asserts that the first exception applies because the GPPA, a state statute, is the "statute governing the claim." We find no merit to this interpretation. Logic and a proper reading of case law demand limiting "statutes governing the claim" to federal statutes.[14] Since the GPPA is not a federal statute it does not fall within this exception. Norfolk has not claimed that they are entitled to attorneys' fees as a result of any bad faith on the part of Misener, so we will not consider the second exception.

The dredging contract did not contain a provision providing for the indemnification of attorneys' fees. Norfolk was a sophisticated party who was, or should have been, well aware of the law of our Circuit concerning attorneys' fees in maritime cases. Furthermore, Norfolk drafted the contract.[15] In conclusion, the general rule that each party bear its own attorneys' fees in maritime contract disputes was well established at the time that Norfolk entered into the contract. See *Natco*, 267 F.3d at 1193. The contract

[14] See *Noritake Co., Inc. v. M/V Hellenic Champion*, 627 F.2d 724, 730 (5th Cir. 1980) (in outlining the exception for fees awarded by statute, stating "[n]or is there any other federal statutory authorization for the award of attorneys' fees") (emphasis added).

[15] "The traditional rule of construction in admiralty cases is to 'construe the contract language most strongly against the drafter.' " *Edward Leasing Corp. v. Uhlig & Assocs., Inc.*, 785 F.2d 877, 889 (11th Cir. 1986) (citation omitted).

exception was also well established. See id. Norfolk was free to contract for the indemnification of attorneys' fees, but chose not to. The GPPA will not serve as an escape clause for Norfolk when the legal framework for the shifting of attorneys' fees was clear prior to Norfolk's drafting of the contract.

C. The GPPA Cannot Supplement Substantive Maritime Law

In the alternative, Norfolk asks this Court to incorporate the GPPA into substantive maritime law. "[W]hen neither statutory nor judicially created maritime principles provide an answer to a specific legal question, courts may apply state law provided that the application of state law does not frustrate national interests in having uniformity in admiralty law." *Coastal Fuels*, 207 F.3d at 1251. State law may be applied to issues of a maritime nature if: (1) there is not an act of Congress that speaks to the issue; (2) the state law does not contravene a characteristic feature of the general maritime law; and (3) the state law does not interfere with the proper harmony and uniformity of maritime law. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 529 (1917), superseded by statute, Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at, 33 U.S.C. § 901 et seq.).[16] Congress has not spoken

[16] The application of this rule has not been completely clear and consistent. "It would be idle to pretend

(continued...)

directly on the subject of whether a prevailing party is or is not entitled to collect attorneys' fees in a dredging dispute. That leaves us to determine whether the shifting of attorneys' fees "is either a 'characteristic feature' of admiralty or a doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S.Ct. 981, 985 (1994) (citing *Jensen*, 244 U.S. at 216, 37 S.Ct. at 529). We conclude that the principle that each party bear its own attorneys' fees is a characteristic feature of maritime

[16](...continued)
that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S.Ct. 981, 987 (1994) (Scalia, J.). The Supreme Court has incorporated various types of state law into the body of substantive maritime law, under varying justifications. See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 215-16, 116 S.Ct. 619, 628 (1996) (state wrongful death statute); *Am. Dredging*, 510 U.S. at 450-53, 114 S.Ct. at 986-88 (state forum non conveniens rule); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 327-29, 93 S.Ct. 1590, 1593-94 (1973) (state law regulating oil spills and oil handling in state territorial waters); *Wilburn Boat*, 348 U.S. at 312 & nn. 2-3, 75 S.Ct. at 369 & nn. 2-3 (state law regarding marine insurance contracts); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 307, 63 S.Ct. 1067, 1067-68 (1943) (state unemployment insurance tax applied to workers on a dredge).

law, and so we do not reach the question of proper harmony and uniformity.

D. The American Rule is a Characteristic Feature of Substantive Maritime Law

The principle that each party should bear its own attorneys' fees, the American Rule,[17] has become firmly entrenched and consistently adhered to in American federal legal practice.[18] Norfolk argues, as some courts have ruled, that the rule that each party bear its own attorneys' fees is not a characteristic feature of maritime law, but is rather only a general federal

[17] The idea that each party should bear its own attorneys' fees is referred to as the American Rule in contrast to the English standard wherein the prevailing party is awarded attorneys' fees. See *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1511 n. 16 (11th Cir. 1988) (citation omitted).

[18] See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271, 95 S.Ct. 1612, 1628 (1975) (the rule that each side pay its own attorneys' fees is "deeply rooted in our history and in congressional policy"); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 1407 (1967) ("The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor."); *Oelrichs v. Spain*, 82 U.S. (15 Wall.) 211, 231 (1872) (the principle of precluding the shifting of attorneys' fees "rests on a solid foundation" and the shifting of attorneys' fees is "forbidden by the analogies of the law and sound public policy").

procedural rule.[19] Essentially, Norfolk acknowledges that the American Rule is the default rule of substantive maritime law, but argues that it does not rise to the level of a characteristic feature of maritime law. Thus, according to the analysis in *Jensen*, 244 U.S. at 216, 37 S.Ct. at 529, and *Am. Dredging*, 510 U.S. at 447, 114 S.Ct. at 985, the default American Rule must give way to the GPPA (provided the GPPA does not contravene the uniformity interests of maritime law).

In *American Dredging* the Court found that *forum non conveniens* was not a characteristic feature of maritime law because it "neither originated in admiralty nor has exclusive application there. To the contrary, it is and has long been a doctrine of general application." 510 U.S. at 450, 114 S.Ct. at 987 (holding that a Louisiana *forum non conveniens* rule could be used in a case that was applying substantive maritime law). Similarly, the American Rule did not originate in maritime law, it does not have exclusive application in

[19] In *Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 791 (Alaska 1997), the Supreme Court of Alaska incorporated an Alaskan law providing for the recovery of attorneys' fees into substantive maritime law. The court found that the preclusion of attorneys' fees is a rule of general federal procedure (i.e., the American Rule), not a characteristic of maritime law. Id. at 789; see also David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. Mar. L. & Com. 507, 563-66 (1996) (putting forth the argument that courts have mistaken the American Rule for a substantive maritime rule when it is actually a general federal procedural rule).

maritime law, and it is a doctrine of general application in federal law.

The GPPA is distinguishable from the Supreme Court's holding in *American Dredging*. First, the GPPA is a substantive law as opposed to *forum non conveniens*, which is a procedural rule. Second, in *American Dredging* there was not a firmly established principle regarding *forum non conveniens* in maritime cases. In contrast, it has long been an established rule in maritime law that each party generally bears the costs of its own attorneys' fees.

We hold that the consistent and continued application of the American Rule to maritime disputes has established the American Rule as a characteristic feature of substantive maritime law. Although we recognize the position of those who argue that the American Rule is not a characteristic feature of maritime law, the long developed precedent of this Circuit and others cannot be so easily set aside. Therefore, the GPPA's entitlement to attorneys' fees is in direct conflict with this principle of substantive maritime law. Thus, the GPPA cannot be incorporated into substantive maritime law.

IV. CONCLUSION

We find that the dredging contract between Norfolk and Misener is governed by substantive maritime law. Further, the rule that each party bear its own attorneys' fees is a characteristic feature of substantive maritime law. Norfolk freely drafted the contract but chose not to contract out of this general

rule. We will not allow Norfolk to alter the terms of its contract through the retroactive injection of a state law that contravenes a principle of substantive maritime law. We affirm the order of the district court denying Norfolk's request for attorneys' fees.

AFFIRMED.

BLACK, Circuit Judge, specially concurring:

While I concur in the result, I write separately because I would analyze differently the issue of whether the GPPA can supplement admiralty law. I would hold application of the GPPA would disrupt the proper harmony and uniformity of admiralty law, and thus I would not reach the issue of whether the American Rule is a characteristic feature of admiralty law.

In *American Dredging*, the Court found a state law rejecting *forum non conveniens* did not disrupt the uniformity of maritime law because the doctrine "is procedural rather than substantive, and it is most unlikely to produce uniform results." 510 U.S. at 453, 114 S.Ct. at 988. The *American Dredging* Court also found *forum non conveniens* would not disrupt the uniformity of admiralty law because it would have little effect on parties' conduct both inside and outside the courtroom. Id. at 454-55, 114 S.Ct. at 988-89.[1]

[1] The Court in *American Dredging* states the (continued...)

Unlike *forum non conveniens*, the American Rule is a substantive law that yields consistent and predictable results.[2] Moreover, attorneys' fees can be a substantial portion of a party's recovery and thus could influence secondary behavior, such as a decision of where to sue. Other courts that have considered the application of state statutes providing for attorneys' fees in maritime cases have also concluded uniformity is an important interest. See *Sosebee v. Rath*, 893 F.2d 54, 56-57 (3d Cir. 1990); *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 406 (5th Cir. 2003); *Garan, Inc. v. M/V Aivik*, 907 F.Supp. 397, 401 (S.D.Fla. 1995). Although I concur the GPPA cannot supplement admiralty law in this case, I would conclude its application would disrupt the proper harmony and uniformity of admiralty law.

[1](...continued)
uniformity analysis is not limited to the state law's impact on maritime commerce. Id. at 453 n. 3, 114 S.Ct. at 988 n. 3. As the Court indicates, however, the Supreme Court's uniformity analysis has not been entirely clear or consistent. See id. at 452, 114 S.Ct. at 987.

[2] Norfolk argues the exceptions to the American Rule demonstrate that maritime law already tolerates a lack of uniformity in the provision of attorneys' fees. These exceptions, however, are consistently applied on a national level. The American Rule thus yields consistent and predictable results despite its limited exceptions.

United States District Court,
Southern District of Georgia,
Savannah Division.

MISENER MARINE CONSTRUCTION, INC.,
Plaintiff,
v.
NORFOLK DREDGING COMPANY, et al.,
Defendants.
Norfolk Dredging Company, Counterclaim Plaintiff,
v.
Misener Marine Construction, Inc., Counterclaim Defendant.
Norfolk Dredging Company, Third-Party Plaintiff,
v.
Travelers Casualty & Surety Company of America, Third-Party Defendant.

No. 404CV146.
November 24, 2008

ORDER[1]

B. AVANT EDENFIELD, District Judge.

I. INTRODUCTION

Before the Court in this admiralty case are three pending matters: (1) Norfolk Dredging Company

[1] This case was originally before the Hon. John F. Nangle but, since his passing, has been reassigned to the undersigned. Doc. # 317.

(Norfolk)'s claim for attorneys' fees from Misener Marine Construction, Inc. (Misener) (doc.237, 245, 281, 282, 284, 289, 290, 291); (2) Norfolk's claim that Misener has not yet satisfied the judgment against it (doc. # 291); and (3) Norfolk's Bill of Costs. Doc.157, 158, 183, 226.

II. BACKGROUND

Norfolk's claims in this lawsuit arose out of Misener's and Travelers Casualty & Surety Co. (Travelers)'s failure to pay Norfolk for 2004 dredging work that Norfolk performed for Misener. Instead of paying Norfolk, Misener sued it for negligence, alleging that the dredging work adversely affected Misener's dock construction project. Doc. # 1. Norfolk denied liability and counterclaimed against Misener, then filed a third-party claim against Travelers as a payment bond surety. Doc. # 14. As its sole defense to Norfolk's counterclaim, Misener simply "adopt[ed] each and every allegation, claim, and assertion made in its Complaint against Norfolk." Doc. # 23 at 5. Misener later filed an Amended Complaint, including claims against General Gas Carrier Corp./ The Steven N (General Gas) and against certain other, since-dismissed parties. Doc. # 25.

In 10/05, Misener filed two voluntary Motions to Dismiss. Doc.120 & 119. One asked the Court to dismiss with prejudice all of Misener's claims against Norfolk. Doc. # 120. The other sought a with-prejudice dismissal of Misener's claims against General Gas. Doc. # 119. Each motion stated that "for various and sundry

reasons unrelated to the merits, the Plaintiff Misener . . . no longer wishes to pursue its causes of action." Id. at 1; doc # 120 at 1. Norfolk and General Gas did "not object to the Motions to Dismiss filed by Misener, provided [that] Norfolk's Counterclaim against Misener and Third-Party Claim against Travelers remain[ed] pending for adjudication by this Court," while Misener's claims were dismissed with prejudice. Doc. # 122 at ¶¶ 6, 7.[2]

The Court granted the Motion to Dismiss. Doc. # 126. Norfolk then filed a Motion for Summary Judgment (MSJ) on its counterclaim for its $166,152.00 in dredging services, plus interest and attorneys' fees as provided under Georgia's Prompt Pay Act (GPPA), O.C.G.A. §§ 13-11-7 & -8 (2005). Doc. # 130.

The Court granted Norfolk's motion in part and, under the GPPA, awarded the requested $166,152.00 plus interest at the rate of 7% per year from 9/3/04 to 10/20/04, and thereafter at the rate of 1% per month. Doc. # 237 at 8. The Court also concluded that an award of attorneys' fees pursuant to Georgia state law was not inconsistent with federal maritime law, so the GPPA's provisions regarding attorneys' fees and related interest should supplement general maritime law in this case. Id. at 4-8. The Court did not, however, issue a final ruling on attorneys' fees. Rather, it instructed the parties to brief whether the GPPA would allow for attorneys' fees accrued by Norfolk while defending

[2] Norfolk also expressly reserved "all rights with respect to its Counterclaim and Third-Party Claim." Doc. # 122 at ¶ 6.

itself from Misener's claim (as opposed to limiting fees to those accrued in prosecution of Norfolk's counterclaim). Id. at 10. The parties have complied. Doc.245,306,307.

III. ANALYSIS

A. Norfolk's Attorneys' Fees

Misener urges the Court to reevaluate Judge Nangle's ruling on attorneys' fees and hold that federal maritime law prohibits application of GPPA's attorneys' fee provision. Doc. # 307. The issue is whether it is improper to apply state law to award attorneys' fees in this case.

1. Admiralty Law

The Court previously concluded that, "because this case involves dredging in navigable waters, it falls within admiralty's domain." Doc. # 237 at 5. That conclusion deserves some attention. To determine whether a contract is a maritime contract, courts look to the nature of the transaction. *North Pacific S.S. Co. v. Halls Bros. Marine R. & Shipbuilding Co.*, 249 U.S. 119, 125, 39 S.Ct. 221 (1919). Traditionally, dredging vessels and their activities have come under admiralty jurisdiction. See *Ellis v. U.S.*, 206 U.S. 246, 259, 27 S.Ct. 600 (1907) ("The scows and the floating dredges were vessels ... within the admiralty jurisdiction of the United States") (cites omitted); *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005) ("this Court has often said that dredges ... qualify as vessels under [maritime statutes]"); *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043

(1995) (damage resulting from use of a crane on a barge to drive piles into riverbed was subject of admiralty jurisdiction); *Standard Dredging Corp. v. Henderson*, 150 F.2d 78 (5th Cir. 1945) (Admiralty law was applied to death of a man whose "work though mostly on land was in direct connection with and assistance of the dredge which was engaged in improving a navigable waterway. The placing of the dirt on the shore was only incidental to the main enterprise, which was maritime"); *The International*, 89 F. 484 (3d Cir. 1898) ("Admiralty jurisdiction attaches to ... dredges. Within the sphere of their activities they are subject to the maritime law of contracts and of torts and to the laws of navigation").

Despite the maritime nature of the contract, Norfolk argues that state law should govern because "jurisdiction over [its claims] is based on diversity, not admiralty." Doc. # 197 at 9. However, admiralty jurisdiction applies to Norfolk's claims even though Norfolk invokes diversity jurisdiction. Doc. # 197 at 9. A party's rights in admiralty do not depend on whether the claim was filed in admiralty or diversity. *Pope & Talbot v. Hawn*, 346 U.S. 406, 410-11, 74 S.Ct. 202 (1953) (Court rejected the argument that state law must govern in admiralty case when plaintiff invoked diversity jurisdiction noting that "the substantial rights of an injured person are not to be determined differently whether his case is labeled 'law side' or 'admiralty side' on a district court's docket") (cite omitted); see also *Capozziello v. Brasileiro*, 443 F.2d 1155, 1157 (2d Cir. 1971) ("That the district court's diversity, rather than its admiralty, jurisdiction has

been invoked does not change the applicable law"). Thus, the substantive law depends on the nature of the contract in dispute – not the jurisdictional hook relied upon by the claimant.

Norfolk also argues that, because a general contract between Misener and Georgia Ports Authority (GPA) had an express provision that Georgia law would control that contract, it follows that Georgia law must govern the subcontract between Misener and Norfolk (the Dredging Agreement). Doc. # 197 at 6-7. Where parties have included a choice of law clause in an admiralty contract, state law may govern. See *Stoot v. Fluor Drilling Serv.*, 851 F.2d 1514, 1517 (5th Cir. 1988). Thus, Georgia law may govern the contract between Misener and GPA. However, Norfolk admits that "the Dredging Agreement itself contains no choice of law provision." Doc. # 197 at 5. And it cites no legal authority for the proposition that a choice of law provision in a general contract has any bearing on the law governing a separately negotiated subcontract between different parties simply because the subject matter is related.

Meanwhile, it cannot be denied that Norfolk's claims arose from a contract related to traditional maritime activities to be performed on navigable waters. Thus, the contract falls under admiralty jurisdiction, so maritime law governs here.

2. State Law

In a previous Order this Court concluded that the GPPA should supplement maritime law. Doc. # 237

at 8. Misener believes that this holding was in error and requests this Court to "find that, absent one of the well-known exceptions, a claim under federal maritime law cannot be subject to claims of attorneys' fees based upon state statutes." Doc. # 307 at 12.

The exercise of admiralty jurisdiction "does not result in automatic displacement of state law." *Jerome V. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 544-57, 115 S.Ct. 1043 (1995). "[W]hen neither statutory nor judicially created maritime principles provide an answer to a specific legal question, courts may apply state law provided that the application of state law does not frustrate national interests in having uniformity in maritime law." *Coastal Fuels Mktg., Inc. v. Florida Express Shipping Co., Inc.*, 207 F.3d 1247, 1251 (11th Cir. 2000). "[S]tate laws inconsistent with the substance of federal maritime law should be given no effect." *White v. Mercury Marine Div. of Brunswick, Inc.*, 129 F.3d 1428, 1431 (11th Cir. 1997) (cite omitted). Thus, the question for this Court is whether Georgia's state law should supplement maritime law.

a. Attorneys' Fees Under Maritime Law

The law regarding attorneys' fees under maritime law is clear. "The prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course. Attorneys' fees generally are not recoverable in admiralty unless (1) they are provided by the statute governing the claim, (2) the nonprevailing party acted in bad faith in the course of the litigation, or (3) there is a contract providing for the indemnification of attorneys' fees." *Natco Ltd. P'ship v. Moran Towing of*

Florida, Inc., 267 F.3d 1190, 1193 (11th Cir. 2001) (citing *Noritake Co. v. Hellenic Champion*, 627 F.2d 724, 730, 730-31 n. 5 (5th Cir. 1980)).

Norfolk argues that even if maritime law does apply, attorneys' fees are recoverable under *Natco* because the GPPA provides for them and is "the statute governing the claim." Doc. # 197 at 13. That argument simply begs the question that is at issue – whether state law may govern an attorneys' fees awards under a maritime contract. Further, the "governing statute" exception allowing for attorneys' fees appears to contemplate a federal statute. And Congress – not the states – calls the shots here. See *Noritake*, 627 F.2d at 730 ("Although Congress undoubtably could have explicitly provided for the award of attorneys' fees ... no such statutory authorization appears.... Nor is there any other federal statutory authorization for the award of attorneys' fees in this type of admiralty proceeding. Absent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees.") (emphasis added) (cite omitted).

In a footnote Norfolk attempts to exploit *Natco*'s "bad faith" criterion: "Meisener's [sic] claim that it nonetheless filed its action in good faith is not well taken." Doc. # 197 at 4 n. 4. Norfolk, however, has presented no convincing support for that charge. Nor does it cite to a contractual provision providing for indemnification of attorneys' fees. Thus, none of the Natco/Noritake exceptions apply.

As maritime law does not allow for attorneys' fees in this case, the Court might end its analysis here.

However, Judge Nangle previously ruled that the GPPA attorneys' fees provision could supplement maritime law. Doc. # 237 at 5-8. That inconsistency must now be addressed.

b. Case Law

Misener insists that the case law relied upon does not support Judge Nangle's conclusion. Doc. # 307. The Court cited to *Coastal Fuels* for the proposition that state law attorneys' fee awards in admiralty cases do not undermine the uniformity of maritime law. Doc. # 237 at 6, 7. But in *Coastal Fuels*, argues Misener, "a specific contractual provision allow[ed] for the recovery of attorney's fees as damages for breach of the [contract]." *Coastal Fuels*, 207 F.3d at 1250. It allowed for fees to be awarded to the "prevailing party" and the issue in that case was how to define that term. Because "[n]othing particularly maritime in nature sticks out about [the issue of how to define "prevailing party"], [the court looked] to [state] law for guidance." Id. at 1251-52.

The *Coastal Fuels* award of attorneys' fees thus was based on one of the three *Natco/Noritake* exceptions – an express contractual provision – and not the application of state law. State law was only used to interpret an ambiguous term of the contract. The Court therefore agrees with Misener that Judge Nangle's reliance on that case was misplaced.

The Court had also cited to *All Underwriters v. Weisberg*, 222 F.3d 1309 (11th Cir. 2000). Doc. # 237 at 6. That case, argues Misener, does not support an award of attorneys' fees because it was limited to a

maritime insurance contract – a special case in which state law has traditionally been applied to maritime law. Doc. # 307 at 7-8. That case held that "a district court may award attorney's fees pursuant to [a Florida statute] against an insurer in a maritime insurance case." Id. at 1315 (emphasis added).

The *Weisberg* holding was based on Supreme Court precedent that "the interpretation or construction of a marine insurance contract is to be determined by state law." Id. at 1313 (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321, 75 S.Ct. 368 ("We, like Congress, leave the regulation of marine insurance where it has been-with the states")). Nothing in *Weisberg* suggests that its holding extended beyond maritime insurance contracts, and both parties in that case agreed that "in general, attorney's fees are not recoverable in admiralty actions." Id. Since the contract in this case was not for marine insurance, this Court's reliance on that case also was misplaced.

The Court also relied on *Garrett v. Midwest Construction Co.*, 619 F.2d 349 (5th Cir. 1980). In *Garrett* a subcontractor sued the general contractor over a dredging contract asserting claims under the "federal common law" and under state law, pursuant to diversity jurisdiction. Id at 352-353. The Court denied the award of attorneys' fees for the federal claim, but awarded attorneys' fees on the state law claim pursuant to a state statute. Id. The Court cited the rule that "[i]n an ordinary diversity case where state law does not run counter to a federal statute or rule of court ... state law [governing attorneys' fees], which reflects a substantial policy of the state, should be followed." Id. at 353.

Indeed, the facts of *Garrett* and this case are strikingly similar. However, as Misener points out, "[n]either party in *Garrett* asserted any claims or defenses based on maritime law. Hence, the case was decided purely upon state law through diversity jurisdiction and should not create any precedent for admiralty jurisdiction." Doc. # 307 at 9.

Garrett thus does not create a rule that a state law providing for attorneys' fees may be invoked in admiralty; indeed, it says nothing of admiralty. Perhaps the most pertinent aspect of *Garrett* is that the case did not apply maritime law when considering a claim for breach of a dredging contract. It is unclear why this was so. Perhaps neither party attempted to invoke admiralty jurisdiction; or, perhaps the contract there had an express provision to apply state law. Given the contrary legal precedent cited *supra*, the Court cannot infer from *Garrett* a rule that dredging contracts, performed by vessels on navigable waters, are not subject to admiralty jurisdiction. In any event, because *Garrett* did not consider the application of a state attorneys' fees statute in an admiralty case, it did not resolve that question.

Misener, meanwhile, cites several persuasive cases that are on-point and that support its position. In *Texas A & M Research Found. v. Magna Transp. Inc.*, the Fifth Circuit refused to apply a state statute to allow the prevailing party in an admiralty contract dispute to collect attorneys' fees. 338 F.3d 394, 405 (5th Cir. 2003) It held that "the general rule of maritime law that parties bear their own costs, coupled with the need for uniformity in federal maritime law[,] precludes

the application of state attorney fee statutes." Id. at 406. The Third Circuit has held that "where a case arises under the federal maritime law ... a local statute awarding attorneys' fees should not be applied." *Sosebee v. Roth*, 893 F.2d 54, 56-57 (3d Cir. 1990). And in a maritime breach of warranty dispute, the First Circuit held that "the conduct found to violate [the state statute] falls squarely within the focus of existing maritime law, and [the state statute's] attorney's fee provision, being inconsistent with maritime law, cannot be applied to this case." *Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37, 42 (1st Cir. 1993). See also *Kearny Barge Co., Inc. v. Global Ins. Co.*, 943 F.Supp. 441 (D.N.J. 1996), aff'd 127 F.3d 1095 (3d Cir. 1997).

The Eleventh Circuit has not weighed in on this particular issue.[3] However, a district court considered "whether [a Florida statute providing for attorney's fees] is applicable in an admiralty jurisdiction case when federal maritime common law does not provide for fee shifting under such circumstances and requires each side to pay its own attorney's fees." *Garan Inc. v. M/V Aivik*, 907 F.Supp. 397, 399 (S.D.Fla.1995). That court noted:

> The Florida statute conflicts with the American rule set forth in federal common law, as the Florida substantive rule

[3] In *Noritake*, a party argued on appeal that a Texas statute authorized a discretionary award of attorneys' fees in an admiralty case. 627 F.2d at 731. That court did not reach the question because the party had not raised it at trial. Id. at 730-732.

> impermissibly imposes an additional obligation on the parties in direct conflict with long-standing federal maritime common law. [¶] While Defendant argues that courts have increasingly applied state law as a supplement to the federal maritime law, such applications are only valid when federal statutory or common law is silent on the issue. See, e.g., *Wilburn Boat Co. v. Fireman's Fund Insur. Co.*, 348 U.S. 310, 75 S.Ct. 368 (1955). The federal law regarding the award of attorneys' fees in the maritime context is clear and directs each side to pay its own fees. [¶] Moreover, a strong interest exists in maintaining uniformity in maritime law. In *Sosebee*, supra, the Third Circuit noted that this interest "would be undermined if the availability of attorneys' fees depended upon where the plaintiff filed suit." *Sosebee* at 56-57. Consequently, this Court believes that Florida Statutes § 768.79 would frustrate the need for uniformity in the admiralty jurisdiction and is preempted by federal maritime common law.

Id. at 400-01.

The Court finds this reasoning persuasive. There is a clearly established rule that admiralty law requires plaintiffs to pay their own attorneys' fees, and the GPPA is inconsistent with that law. Thus, state law should not supplement admiralty law. Norfolk's

attorney fee request is therefore denied.

* * * *

IV. CONCLUSION

Misener Marine Construction, Inc. is ORDERED to pay Norfolk Dredging Company $32,385.19 for principal and interest that remains outstanding on the Court's 1/6/06 judgment. Doc. # 237.

The Court SUSTAINS in part Misener's Objections to Norfolk's Bill of Costs. Doc. # 183. It thus GRANTS to Norfolk only $16,571.98 of its requested costs against Misener. Doc. # 157. The Court DENIES Norfolk's motion for attorneys' fees. Doc.197, 245.

Finally, pursuant to the settlement between Misener and General Gas Carrier Corp./The Steven N, doc. # 313, the Clerk's Office shall take no action on General Gas's Bill of Costs. Doc. # 135.

Georgia Code Annotated, § 13-11-1 *et seq.* {Georgia Prompt Pay Act ("GPPA")}

Georgia Code Annotated Title 13. Contracts

Chapter 11. Prompt Payment

§ 13-11-2. Definitions

As used in this chapter, the term:

(1) "Contractor" means a person who contracts with an owner to improve real property, to perform construction services, or to perform construction management services for an owner. * * * *

§ 13-11-3. Contractor or subcontractor entitled to payment

Performance by a contractor or subcontractor in accordance with the provisions of his or her contract and the satisfaction of the conditions of his or her contract precedent to payment entitles such person to payment from the party with whom he or she contracts.

§ 13-11-8. Attorneys' fees

In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be.

CREDIT(s): Georgia Laws 1994, p. 1398, § 1.

Supreme Court, U.S.
FILED
MAY 26 2010
OFFICE OF THE CLERK

No. 09-1164

In The Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

MISENER MARINE CONSTRUCTION, INC., TRAVELERS CASUALTY and SURETY COMPANY OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF NORFOLK DREDGING COMPANY'S PETITION FOR WRIT OF CERTIORARI

DANIEL D. PIPITONE
Counsel of Record
STEVEN J. KNIGHT
CHAMBERLAIN, HRDLICKA, WHITE WILLIAMS & MARTIN, P.C.
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553
daniel.pipitone@chamberlainlaw.com
steven.knight@chamberlainlaw.com

Attorneys for Respondent Misener Marine Construction, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In maritime contract disputes where there is no agreement to shift the risk of attorney's fees, are federal courts required to apply state fee-shifting statutes as an exception to the American Rule?

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

1. Petitioner (Appellant below):
   Norfolk Dredging Company.

2. Respondent (Appellee below):
   Misener Marine Construction, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent, Misener Marine Construction, Inc., is a Florida corporation. Orion Marine Group is Misener Marine Construction, Inc.'s parent company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
The Norfolk Dredging Agreement	1
The Underlying Lawsuit	3
The First Order	3
The Final Order	4
The Appeal	5
SUMMARY OF THE ARGUMENT	5
ARGUMENT	9
A. Petitioner seeks a judicially-crafted exception to the American rule – something this Court has repeatedly declined to do	9
B. *Jensen* has caused no "indiscernible" federal court results in this area	17
C. Petitioner's criticisms of the Eleventh Circuit's analysis fare no better	26
D. Federal courts should not permit state legislators to rewrite maritime contracts	32
CONCLUSION	34

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) .....*passim*

American Dredging v. Miller, 510 U.S. 443 (1994).....*passim*

American Nat'l Fire Ins. Co. v. J. Kenealy, 72 F.3d 264 (2d Cir. 1995).....20, 30

American Union Transport Co. v. Aguadilla Terminal, Inc., 302 F.2d 394 (1st Cir. 1962).....18

APL Co. Pte. Ltd. v. UK Aerosols Ltd., 582 F.3d 947 (9th Cir. 2009) 30

Chambers v. Nasco Inc., 501 U.S. 32 (1991).....14, 16

Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co., 207 F.3d 1247 (11th Cir. 2000).....32

Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc., 747 F.2d 995 (5th Cir. 1984).....30

Ellis v. United States, 206 U.S. 246 (1907).....26

F.D. Rich Co., Inc. v. United States, 417 U.S. 116 (1974) 10, 11, 13, 32

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967).....11, 13, 15

Garan Inc. v. M/V Aivik, 1995 A.M.C. 2657 (S.D. Fla. 1995) 24

Geftman v. Boat Owners Association of the United States, Cause No. C/A 2:02-1461-18 2003 WL 23333312 (D. S.C. 2003).....23, 30

TABLE OF AUTHORITIES – Continued

Page

Goodman v. 1973 26 Foot Trojan Vessel, 859 F.2d 71 (8th Cir. 1988) 30

Gradmann & Holler GMBH v. Continental Lines, S.A., 679 F.2d 272 (1st Cir. 1982) 29, 30

Hall v. Cole, 412 U.S. 1 (1973) 13

Hughes v. Foster Wheeler Co., 932 P.2d 784 (Alaska 1997) 24, 25

Jambon & Assoc. LLC v. Seamar Divers Inc., No. 09-2670, 2009 WL 2175980 (E.D. La. 2009) 22

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 16

Kopacz v. Delaware River and Bay Authority, 248 Fed. Appx. 319 (3rd Cir. 2007) 30

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 33

Natco Ltd. P'ship v. Moran Towing of Fla., Inc., 267 F.3d 1190 (11th Cir. 2001) 30, 32

Norfolk Southern Ry. v. Kirby, 543 U.S. 14 (2004) 26, 33

Norwalk Cove Marina, Inc. v. S/V Odysseus, 64 Fed. Appx. 319 (2nd Cir. 2003) 20

Norwalk Cove Marina, Inc. v. S/V Odysseus, 90 F.Supp.2d 190 (D. Conn. 2000) 20, 21

OneBeacon Am. Ins. Co. v. Turner, No. 06-20302, 204 Fed. Appx. 383 (5th Cir. 2006) 22

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546 (1986) 16

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 27

Shinichi Jonathan Sakanaka Louis v. Atlantis Submarines, Inc., 1999 A.M.C. 1204 (D. Hawaii 1999) 23

Sosebee v. Rath, 893 F.2d 54 (3rd Cir. 1990).....21

Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) .....*passim*

Southworth Mach. Co. v. F/V Corey Pride, 994 F.2d 37 (1st Cir. 1993) 19

Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676 (1st Cir. 1979) 19

Stewart v. Dutra Constr. Co., 543 U.S. 481 (2005) 26

Summit Valley Industries, Inc. v. Local 112, 456 U.S. 717 (1982) 14

Tampa Port Authority v. M/V Duchess, et al., 2000 A.M.C. 114 (M.D. Fla. 1997) 23

Templeman v. Chris Craft Corp., 770 F.2d 245 (1st Cir. 1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 (1985).....19, 21

Texas A&M Research Found. v. Magna Transp. Inc., 338 F.3d 394 (5th Cir. 2003) 21, 22

United States ex rel. Garrett v. Midwest Constr. Co., 619 F.2d 349 (5th Cir. 1980) 22

TABLE OF AUTHORITIES – Continued

Page

Vaughan v. Atkinson, 369 U.S. 527 (1962) 29

Wilburn Boat Co. v. Firemen's Ins. Co., 348 U.S. 310 (1955).....15, 24

STATUTES

28 U.S.C. § 1254(1).....1

28 U.S.C. § 1333 .....3, 18

28 U.S.C. § 1923 .....1, 13, 19

28 U.S.C. § 1925 19

Georgia Prompt Pay Act, Ga. Code Ann. § 13-11-8 .....*passim*

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. III, § 2, cl. 1.....18

RULES

FED. R. CIV. P. 9 advisory committee's note (1966 amendment) 27

FED. R. CIV. P. 9(h).....3

OPINIONS BELOW

In *Misener Marine Constr. Co. v. Norfolk Dredging Co.*, 594 F.3d 832 (11th Cir. 2010), the Eleventh Circuit affirmed the decision below that Norfolk Dredging was not entitled to recover its attorneys' fees under a state fee-shifting statute that conflicts with federal maritime law.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals was entered on January 21, 2010.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1923 is set forth in the Appendix at App. 1.

Georgia Prompt Pay Act, Ga. Code Ann. § 13-11-8 is set forth in the Appendix at App. 2.

STATEMENT OF THE CASE

The Norfolk Dredging Agreement

The Port of Savannah ("Port") is the fourth largest container port in the United States and the largest single-terminal operation in North America. App.

at 3a.[1] It is a gateway to and from the Atlantic Ocean and serves as a major distribution hub, including a twenty-six state region. *Id.*

The Georgia Ports Authority hired Misener Marine Construction, Inc. ("Misener" or "Respondent"), a Florida-based maritime construction contractor, to demolish a dock and to build a new dock at the Port. *Id.* Separately, Misener contracted with Norfolk Dredging Company ("Norfolk" or "Petitioner"), a Virginia-based maritime dredging company with operations throughout the Atlantic Coast and beyond,[2] to dredge parts of the Savannah River in the Port. Norfolk wrote the dredging contract which omitted any fee-shifting provision. *Id.* The parties implicitly agreed to adhere to the American Rule.

After Norfolk completed its dredging work, two temporary mooring dolphins pulled from the riverbed causing a vessel to release from its secured position. Misener was forced to make repairs and to reconstruct the damaged mooring dolphins. Misener believed Norfolk's dredging work caused the incident. *Id.* at 4a.

---

[1] The Appendix to the Petition for Writ of Certiorari includes the January 21, 2010 Eleventh Circuit Opinion and the November 24, 2008 District Court Order. Citations herein to "App. at ___a" are references to Petitioner's Appendix.

[2] *See* http://www.norfolkdredging.com/services

The Underlying Lawsuit

Misener sued Norfolk for negligence and breach of the dredging contract in federal court pursuant to 28 U.S.C. § 1333 and Federal Rule of Civil Procedure 9(h). *Id.* Norfolk answered the complaint without challenging the district court's admiralty jurisdiction. Norfolk also counterclaimed for breach of the dredging contract and for interest and attorneys' fees under a state fee-shifting statute – the Georgia Prompt Pay Act ("GPPA"). *Id.* The GPPA provides, *inter alia*: "In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be." O.C.G.A. § 13-11-8. Norfolk did not assert diversity jurisdiction. *See* App. at 4a.

Misener determined Norfolk's work may not have been the cause after all. Accordingly, Misener voluntarily dismissed its claims against Norfolk and attempted to pay Norfolk for its dredging work. *Id.* at 4a-5a. Norfolk rejected Misener's offer, and, instead, incurred additional litigation expenses by filing a motion for summary judgment on its counterclaim. *Id.*

The First Order

Although no exception to the American Rule applied, and notwithstanding the fact that Misener and Norfolk never agreed the prevailing party would

be entitled to its attorneys' fees, the district court determined that awarding Norfolk its fees under the GPPA would not be inconsistent with federal law. App. at 5a-6a. More than two years later, however, the district court requested additional briefing on the issue of attorneys' fees. Before fully resolving the issue, the district court judge passed away. *Id.* at 6a.

The Final Order

A new district court judge determined that maritime law provides the answer – attorneys' fees are not permitted unless an exception to the American Rule applied. Specifically, the district court ruled:

> The law regarding attorneys' fees under maritime law is clear. "The prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course. Attorneys' fees generally are not recoverable in admiralty unless (1) they are provided by the statute governing the claim, (2) the non prevailing party acted in bad faith in the course of the litigation, or (3) there is a contract providing for the indemnification of attorneys' fees."

Id. at 26a (citations omitted). The district court ruled that Misener did not act in bad faith; the parties did not agree in a contract to shift the risk of attorneys' fees; and there was no federal statute at issue that permitted Norfolk to recover its fees. Because Norfolk failed to establish that any of the exceptions applied, the district court denied Norfolk's claim for fees.

The Appeal

The Eleventh Circuit held that the dredging contract is governed by maritime law and that "[t]he prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course." App. at 10a. The court also held that none of the exceptions to the American Rule applied because Norfolk did not assert a claim under a federal statute authorizing fees; Misener did not act in bad faith; and, importantly, Norfolk did not seek Misener's agreement in the dredging contract that the prevailing party would recover its attorneys' fees. App. at 12a. Although Norfolk did not mention *Jensen*[3] in any of its appellate briefs, the court also cited the case to illustrate that the GPPA contravenes a characteristic feature of the general maritime law and interferes with its proper harmony and uniformity. *Id.* at 13a.

SUMMARY OF THE ARGUMENT

Petitioner asks this court to overturn *Jensen* and require federal district courts applying federal maritime law to recognize state fee-shifting statutes as an exception to the American Rule, which generally requires each party to pay its own attorneys' fees in maritime disputes. *Jensen* and its progeny, including *American Dredging*,[4] certainly support circuit courts'

[3] *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[4] *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

unanimous refusal to apply state fee-shifting statutes in non marine insurance federal maritime cases. However, the uniform rule is grounded in the principles articulated in *Alyeska Pipeline*,[5] in which this Court recognized the historic origin of the American Rule, the need to apply the general rule uniformly in all cases under federal law, and that Congress, not the judiciary, must establish any further exceptions to it. Petitioner presents no justification, let alone a compelling one, to abandon or simply ignore *Alyeska Pipeline's* unwavering precedent, and its assurance that it does not intend to "subvert" the holding is hardly an adequate substitute.

The American Rule's general prohibition against a prevailing party's recovery of its attorneys' fees is deeply rooted in the nation's federal common law. It developed from legislation that limited the practice of permitting the recovery of fees under state statutes, which has historically produced unjust results that could not be reconciled with Congress' call for equity and predictability in the federal court system. Thus, by statute, Congress limited the recovery of fees in cases brought in federal courts, including, *expressly*, cases under maritime law.

Federal courts have long adhered to Congress' statutory limitation on fee awards, subject only to certain clearly-defined narrow exceptions. Importantly,

---

[5] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

the American Rule will not prevent a remedy where there is a contract providing for the indemnification of attorneys' fees. And admiralty law's strong tradition of enforcing parties' contractual agreements assures that contractual fee-shifting clauses will be enforced. Federal courts have consistently declared that these substantive principles are firmly established in federal maritime law, where the call for substantive uniformity is, perhaps, heard the loudest.

The district court and the court of appeals followed this Court's precedent that any further exceptions to the American Rule's prohibition on fee-shifting would have to be established by Congress, not by the judiciary, and certainly not by a state's legislators. The court remained loyal to uniform federal maritime precedent that, absent a contractual agreement, the risk and burden of attorneys' fees cannot be shifted to another party that was not compensated for shouldering the risk. And it followed the rule from courts in six other federal circuits which have earnestly rejected the very proposition Petitioner (implicitly) urges this Court to adopt – that when confronted with the clear conflict between a state fee-shifting statute and the clear and uniform rule pronounced in *Alyeska Pipeline*, courts should simply shrug at the federal precedent.

Petitioner makes much of the criticism over *Jensen*, calling for the Court to reverse that "ill-starred" decision. However, for whatever criticism *Jensen's* uniformity analysis brings, any further treatment of the preemption analysis would neither alter that

which this Court so boldly declared in *Alyeska Pipeline* – that further exceptions to the American Rule will not be judicially established – nor change the fact that recognition of substantive state fee-shifting statutes in federal maritime contract disputes would drastically undermine the predictable uniform results the American Rule has provided. As this Court held in *American Dredging*, a state court may not "attempt to make changes in the *substantive* maritime law." Nor may it rewrite parties' clearly defined maritime commercial agreements.

And the remedy Petitioner seeks by overturning ninety-three years worth of judicial precedent was in its command all along. If Petitioner wanted the right to be indemnified for its attorneys' fees, it could have included a fee-shifting clause in its maritime contract. Existing clearly-defined principles of federal maritime law would then have honored Petitioner's claim. But Petitioner chose not to agree that the prevailing party would recover its fees, perhaps because it knew the obligation would be reciprocal, presenting a risk Petitioner chose not to bear. So, instead, Petitioner seeks a monumental change in federal maritime law to permit its recovery of fees under a state statute, all with the hind-sight knowledge that it prevailed in the lawsuit. The court of appeals said it best: "The [state statute] will not serve as an escape clause for Norfolk when the legal framework for the shifting of attorneys' fees was clear prior to Norfolk's drafting of the contract."

Because current federal maritime law and existing Supreme Court precedent answers the precise question presented here, *i.e.*, whether there is an exception to the American Rule for state fee-shifting statutes, the debate over the appropriate framework of *Jensen* is better left for a dispute that arises in a more salient context – one in which the state law presents a rule that is not in direct conflict with unchallenged Supreme Court authority; and one in which the sought-after relief was beyond the parties' ability to obtain *via* contract.

This Court should deny Petitioner's Writ of Certiorari.

ARGUMENT

A. Petitioner seeks a judicially-crafted exception to the American rule – something this Court has repeatedly declined to do.

> *"[I]t is not for us to invade the legislature's province by redistributing litigation costs . . . "*

–Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 271 (1975).

Petitioner asks this Court to create an exception to the American Rule that would recognize state fee-shifting legislation in federal maritime contract disputes. In Petitioner's words, "[o]bviously, the question raised here is whether a state statutory grant of attorneys' fees would qualify as an exception to the American Rule." Petition at 28, n. 8. This Court has already answered Petitioner's question.

In *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974), this Court addressed whether a successful Miller Act plaintiff was entitled to collect its attorneys fees in a commercial contract dispute "where the 'public policy' of the State in which suit was brought allows for the award of fees in similar contexts." *Id.* at 126. This Court explained that federal courts have long adhered to a uniform rule that "avoids many of the pitfalls which have already manifested themselves in using state law referents." *Id.* at 127. The American Rule provides a uniform result, while not completely barring recovery in all situations, such as where a federal statute permits recovery, a party agrees to shift fees in a contract, or where a clearly defined exception applies. *See id.* at 129-30. Ultimately, this Court held that it would not recognize a new exception to the American Rule to permit fee-shifting in a common commercial dispute:

> In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do. The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merit of arguments for a further departure from the American Rule in Miller Act commercial

> litigation, those arguments are properly addressed to Congress.

Id. at 130-31. *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967) (recognizing that "[t]he rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor").

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court again declined to recognize a further exception to the American Rule and held that the issue was for Congress to decide, not the judiciary. At issue was Wilderness Society's request for attorneys' fees in a lawsuit aimed at preventing the Secretary of the Interior from issuing permits for the trans-Alaska oil pipeline. The court of appeals awarded attorneys' fees as a purported exception to the American Rule for performing the services of a private attorney general. This Court reversed, offering a compelling analysis of the history of the country's fee-shifting rules.

Because common law did not permit the recovery of attorneys' fees, "[d]uring the first years of the federal-court system, Congress provided through legislation that the federal courts were to follow the practice with respect to awarding attorneys' fees of the courts of the States in which the federal courts were located, with the exception of district courts under admiralty and maritime jurisdiction, which were to follow a specific fee schedule." *Id.* at 248-49.

However, where there was no statutory authority for the award, federal courts would not judicially create one. *See id.* at 249. Federal legislation authorizing fees under the states' practice expired by 1800; however, "[t]he practice after 1799 and until 1853 continued as before, that is, with the federal courts referring to the state rules governing awards of counsel fees, although the express legislative authorization for that practice had expired." *Id.* at 250.

As this trend continued, Congress became concerned "that there was great diversity in practice among the courts and that losing litigants were being unfairly saddled with exorbitant fees for the victor's attorneys." *Id.* at 251. Congress thus enacted a "far-reaching [a]ct" intended to limit the recovery of attorney's fees charged to a losing party. *See id.* at 251-52. Senator Bradbury explained the purpose of the 1853 Act:

> The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed. . . .
>
> It is to correct the evils and remedy the defects of the present system, that the bill has been prepared and passed by the House

> of Representatives. It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed. . . .

Id. at 251, n. 24 (citations omitted). Thus, through the 1853 Act, "Congress undertook to standardize the costs allowable in federal litigation." *Id.* at 251. The Act included specific provisions for cases in admiralty and maritime jurisdiction. *See id.* at 253, n. 25.

This Court has enforced the federal legislation limiting attorneys' fees. It struck down unreasonable awards of attorney's fees that were inconsistent with the express statutory provisions. *See id.* at 253-54 (citations omitted). *See also id.* at 257 ("this Court understandably declared in 1967 that with the exception of the small amounts allowed by §1923, the rule 'has long been that attorney's fees are not ordinarily recoverable . . . '") (citing *Fleischmann Distilling Corp.*, 386 U.S. at 717; *F.D. Rich Co.,* 417 U.S. at 128; *Hall v. Cole,* 412 U.S. 1 (1973)).

Although the judiciary had recognized certain limited and clearly-defined exceptions to the general prohibition of fee-shifting, Congress never "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. Instead, " . . . the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. §1923." *Id.* at 269.

Against this background, this Court declined Wilderness Society's invitation to recognize a new exception to the American Rule. Instead, this Court admonished that "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.* This rule "is deeply rooted in our history and in Congressional policy." *Id.* at 271. To hold otherwise "would make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 269.

This Court has consistently adhered to *Alyeska Pipeline's* prohibition of judicially-created exceptions to the American Rule. In *Summit Valley Industries, Inc. v. Local 112,* 456 U.S. 717 (1982), for example, this Court unanimously held that "[i]n the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years." *Id.* at 721 (citing *Alyeska Pipeline,* 421 U.S. at 249-50; *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.Ed. 613 (1796)). *See also Chambers v. Nasco Inc.,* 501 U.S. 32, 59 (1991) (where Justice Scalia noted in his dissenting opinion that the American Rule, " . . . 'deeply rooted in our history and in congressional policy' . . . , prevents a court (without statutory authorization) from engaging in what might be termed substantive fee

shifting, that is, fee shifting as part of the merits award.").

Petitioner fails to explain how the judicial recognition of state fee-shifting statutes in federal maritime cases as an exception to the American Rule can co-exist with federal legislation that limits fees in maritime cases. *See Wilburn Boat Co. v. Firemen's Ins. Co.*, 348 U.S. 310, 314 (1955) ("And States can no more override such judicial rules validly fashioned than they can override Acts of Congress . . . "). Moreover, although Petitioner admits the issue here is whether the GPPA "would qualify as an exception to the American Rule," Petitioner devotes surprisingly little attention to this Court's fee-shifting precedent. Petitioner does not even introduce *Alyeska Pipeline* in its Petition until page 28, where Petitioner assures that it "does not intend to subvert this Court's teachings in *Alyeska Pipeline* . . . and *Fleischmann Distilling* . . . " Petition at 28, n. 8. Petitioner suggests that *Alyeska Pipeline* does not preclude the recognition of state fee-shifting statutes because the opinion states that fees may be awarded where they are authorized by "statute." Petitioner apparently believes this Court's reference to "statute" is broad enough to contemplate a *state* statute. It is not.

Alyeska Pipeline held that fees may be awarded pursuant to federal legislation; that is why the Court deferred the issue of whether there should be further exceptions to the American Rule to Congress, not to

state legislators. *See Alyeska Pipeline,* 421 U.S. at 260-61 ("What *Congress* has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.") (emphasis added). Nothing in *Alyeska Pipeline* or any other Supreme Court case suggests state legislation is an exception to the American Rule. *See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air,* 478 U.S. 546, 561-62 (1986) ("There are exceptions to [the American Rule], the major one being *congressional authorization* for the courts to require one party to award attorney's fees to the other.") (emphasis added); *see also Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the *legislature*, not the courts") (emphasis added); and *Chambers*, 501 U.S. at 63 (wherein Justices Kennedy, Rehnquist and Souter observed in a dissenting opinion that "[t]he American Rule recognizes that the *Legislature*, not the Judiciary, possesses constitutional responsibility for defining sanctions and fees . . . ") (emphasis added). That *Alyeska Pipeline* contemplated federal legislation, not state legislation, cannot be seriously questioned.

Thus, Petitioner's quest for recognition of a state fee-shifting statute as a new exception to the American Rule (or as an extension of an existing exception) never really takes flight. *Alyeska Pipeline* and the

other cases discussed above, of which Petitioner does not seek review, defeat Petitioner's argument.

B. *Jensen* has caused no "indiscernible" federal court results in this area.

Petitioner's call to overturn *Jensen* is based on an oddly misplaced rationale. Petitioner focuses almost entirely on Supreme Court dissenting opinions that have noted potentially inconsistent applications of the preemption analysis in certain contexts – though never in the context of state attorneys' fee statutes. According to Petitioner, the Eleventh Circuit's analysis exemplifies that *Jensen* is nothing more than a "patchwork doctrine which embraces abstract standards and indiscernible distinctions, apparently impervious to precise delineation."[6] Petition at p. 22 (quotations omitted). Petitioner's argument is belied by the fact that every circuit court that has addressed whether the American Rule must bend to state

---

[6] Petitioner assures there are "other, less constitutionally-invasive, means available to ensure the coherence of maritime law . . . " Petition at 27. However, Petitioner explains neither what those less invasive means are, nor the manner in which any new standard would render the Eleventh Circuit's opinion susceptible to attack. Petitioner gave special emphasis to Justice Stevens' concurring opinion in *American Dredging* that "we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law . . . " *Id.* at 21. If this is the standard Petitioner suggests, the American Rule easily qualifies.

fee-shifting statutes in non marine insurance federal maritime cases has rejected the proposition. Petitioner's claims that "lower courts are split on whether such [fee-shifting] statutes are impliedly preempted under *Jensen*," *id.* at 29, and that "there is a division in precedents on whether state attorneys' fee statutes are impliedly preempted under *Jensen*," *id.* at 35, are not accurate.

The U.S. Constitution, Article III provides that federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const., Art. III, § 2, cl. 1. *See also* 28 U.S.C. § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."). As this Court recognized in *American Dredging*, "[i]n exercising *in personam* jurisdiction, however, a state court may adopt such remedies, and . . . attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the *substantive* maritime law." *American Dredging v. Miller*, 510 U.S. 443, 447 (1994) (emphasis added). Substantive maritime law, as the cases below illustrate, rejects state fee-shifting statutes and requires parties to pay their own fees unless an exception to the American Rule applies.

Over forty-eight years ago, the First Court of Appeals recognized that state fee-shifting statutes do not apply in federal maritime litigation. In *American Union Transport Co. v. Aguadilla Terminal, Inc.*, 302

F.2d 394 (1st Cir. 1962), the court reversed a fee award under a state fee-shifting statute because "the present suit is in admiralty, and in admiralty there is no specific authority in the statutes, Title 28 U.S.C. §§ 1923, 1925, or the Admiralty Rules for awarding counsel fees. Lacking such authority, counsel fees are neither allowable nor taxable as costs . . . The award of counsel fees must be stricken from the District Court's decree." *Id.* at 396 (citing *The Baltimore*, 8 Wall 377, 388, 19 L.Ed. 463 *et seq.* (1869); *Daniel F. Young, Inc. v. United States*, 55 F.Supp. 24, 25 (D.C. N.Y. 1944)). *See also Stephenson v. Star-Kist Caribe, Inc.*, 598 F.2d 676, 681-82 (1st Cir. 1979). Thus, in *Templeman v. Chris Craft Corp.*, 770 F.2d 245 (1st Cir. 1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 (1985), the court held that "[p]laintiffs have no legal basis for invoking Rule 14.4(d) of the Puerto Rico Rules of Civil Procedure." *Id.* Rather, "[u]nder admiralty law, a court has inherent power 'to assess attorneys' fees when a party has "acted in bad faith, vexatious, wantonly, or for oppressive reasons"'." *Id.* (citations omitted). More recently, in *Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37 (1st Cir. 1993), the court held that the maritime contract at issue was "a standard contractual breach to which maritime law has always applied." *Id.* at 42. Thus, "[t]he conduct found to violate [the local statute] falls squarely within the focus of existing maritime law, and [the local statute's] attorney's fee provisions, being inconsistent with maritime law, cannot be applied in this case." *Id.*

The Second Circuit applies the same uniform rule. In *American Nat'l Fire Ins. Co. v. J. Kenealy,* 72 F.3d 264 (2d Cir. 1995), the court followed its earlier holding that "' . . . the award of fees and expenses in admiralty actions is discretionary with the district judge upon a finding of bad faith.'" *Id.* at 270 (quoting *Ingersoll Milling Mach. v. M/V Bodena,* 829 F.2d 293, 309 (2nd Cir. 1987)). The court explained that *Ingersoll* "stated the federal prohibition against attorneys' fees and admiralty suits in the broadest of terms. It did not temper its holding by suggesting that a different rule would apply if the insurance company brought the action. We believe that our holding in *Ingersoll* suffices to 'establish' a federal admiralty rule, which now must be followed instead of state law." *Id.* at 270. In *Norwalk Cove Marina, Inc. v. S/V Odysseus,* 64 Fed. Appx. 319 (2nd Cir. 2003), the Second Circuit affirmed the district court's holding that "[t]here is a strong interest in maintaining uniformity in maritime law." *Norwalk Cove Marina, Inc. v. S/V Odysseus*, 90 F.Supp.2d 190, 192 (D. Conn. 2000). The district court reasoned:

> Where a conflict arises between a state statute and judicially established admiralty law, the state law must yield to admiralty as if the admiralty law had been codified by an Act of Congress . . . Admiralty law applies the "American Rule" as to attorneys' fees. Therefore, the Court has discretion to award attorneys' fees upon a showing that opposing counsel has commenced or conducted an action in bad faith, vexatiously, wantonly, or

> for oppressive reasons . . . Accordingly, [the state statute] allows for the award of attorneys fees . . . without meeting the standards established for such awards in admiralty law. Since [the state statute] conflicts with admiralty law, the [state] claim will be dismissed.

Id. at 192-93.

The Third Circuit reached the same conclusion in *Sosebee v. Rath*, 893 F.2d 54 (3rd Cir. 1990), where the court held that federal maritime law preempted a local state fee-shifting statute because the statute was in direct conflict with the American Rule. *See id.* at 56 ("a general award of attorneys' fees pursuant to a state statute which does not require a finding of bad faith directly conflicts with federal admiralty law") (citing *F. Ocean Barge Transp. v. Hess Oil Virgin Islands Corp.*, 598 F.Supp. 45, 47 (D.V.I. 1984) (Virgin Islands' statute allowing attorney's fees should not be applied in admiralty action), *aff'd without opinion,* 760 F.2d 259 (3rd Cir. 1985), and *Templeman*, 770 F.2d at 250). The court explained that its holding was grounded in the "strong interest in maintaining uniformity in maritime law." *Id.* at 56-57.

The Fifth Circuit also adheres to the principle that uniform maritime law prohibits state fee-shifting statutes. In *Texas A&M Research Found. v. Magna Transp. Inc.*, 338 F.3d 394 (5th Cir. 2003), the court held that "[m]aritime disputes generally are governed

by the 'American Rule,' pursuant to which each party bears its own costs."[7] *Id.* at 405 (citing *Galveston County Nav. Dist. v. Hopson Towing Co.*, 92 F.3d 353, 356 (5th Cir. 1996)). Therefore, "absent statute or enforceable contract, litigants must pay their own attorneys' fees." *Id.* More recently, in *OneBeacon Am. Ins. Co. v. Turner*, No. 06-20302, 204 Fed. Appx. 383 (5th Cir. 2006), the court held that "this general rule, coupled with the need for uniformity in federal maritime law, precludes the application even of mandatory state attorney's fee statutes. Absent a federal statute or an enforceable contract, litigants must pay their own attorney's fees."[8] *Id.* at 385 (quotations omitted).

---

[7] Petitioner argues that *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349 (5th Cir. 1980) "should be counted as a court of appeals decision supporting the application of a state attorneys' fee statute in claims brought under concurrent diversity and admiralty jurisdiction." Petition at 32. However, as the court of appeals observed, the issue of whether maritime law preempted the state statute was never addressed. Moreover, even if it could be construed as a case supporting Petitioner's argument, the Fifth Circuit has overruled it in its subsequent cases, such as *Texas A&M Research Found.*

[8] District courts in the Fifth Circuit consistently apply the American Rule over state fee-shifting statutes. Most recently, in *Jambon & Assoc. LLC v. Seamar Divers Inc.*, No. 09-2670, 2009 WL 2175980 (E.D. La. 2009), the district court rejected the application of a state fee-shifting statute, and held that "it is undisputed that the general rule in maritime contract claims precludes recovery of attorney's fees unless there is a controlling statute or contractual provision that allows for such recovery." *Id.* at *8 (citing *Texas A&M Research Found.*, 338 F.3d at 405). The statute cannot apply, the court reasoned, because it "would present an obvious collision between the general maritime rule

(Continued on following page)

Convincingly, courts in the Fourth, Ninth and Eleventh Circuits apply the same uniform rule. In *Geftman v. Boat Owners Association of the United States*, Cause No. C/A 2:02-1461-18 2003 WL 23333312 (D. S.C. 2003), the district court relied on *Norwalk Cove Marina*, cited *supra*, and held: "Attorney's fees are awarded under admiralty law solely under a rare exception to the 'American Rule.' Fees are not allowed unless there has been a showing that opposing counsel has commended or conducted an action in bad faith . . . [the state statute] is inconsistent with that provided under the federal admiralty law and, as such, plaintiff's [claim for fees] is preempted." *Id.* at *4-5. Similarly, in *Shinichi Jonathan Sakanaka Louis v. Atlantis Submarines, Inc.*, 1999 A.M.C. 1204 (D. Hawaii 1999), the court held that a Hawaii fee-shifting statute was not applicable in a maritime dispute. "Atlantis' claim for attorneys' fees arises out of a state statutory provision that awards fees to the prevailing party in breach of contract actions. The breach of contract claim asserted in this case is for maintenance payments. Thus, the subject of the claim is one integrally and historically relegated to maritime law and jurisdiction." *Id.* In *Tampa Port Authority v. M/V Duchess, et al.*, 2000 A.M.C. 114 (M.D. Fla. 1997), the district court held that "[t]he general rule is that the prevailing party's attorney fees are

---

precluding recovery of attorney's fees on a maritime contract claim and the Louisiana state law allowing for recovery of fees under an open account claim." *Id.*

not recoverable in admiralty cases." *Id.* (citing *Noritake Co., Inc. v. M/V Hellenic Champion,* 627 F.2d 724, 730 (5th Cir. 1980)). Thus, "regardless of whether there is an issue of local concern state law cannot displace conflicting federal law." *Id. See also Garan Inc. v. M/V Aivik,* 1995 A.M.C. 2657, 2661 (S.D. Fla. 1995) (rejecting a state fee-shifting statute in a federal maritime case in favor of "a strong interest . . . in maintaining uniformity in maritime law.").

If *Jensen's* task was to further the uniformity of substantive federal maritime law, it must be credited as succeeding when it comes to the question of fee-shifting in ordinary maritime cases. Notably, Petitioner does not address the majority of these federal decisions. Instead, Petitioner focuses on cases arising in the marine insurance context and a state court opinion, *Hughes v. Foster Wheeler Co.*, 932 P.2d 784 (Alaska 1997), as exemplifying the supposed *Jensen*-driven "split" in authority. With respect to the former, the three cases Petitioner cites are based on the recognition that marine insurance matters have historically been addressed under state law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 321, 75 S.Ct. 368, 321 (1955). Petitioner does not argue dredging contracts affecting the nation's largest ports are matters of pure state concern. Petitioner's marine insurance cases are plainly distinguishable and have little value here.

With respect to the latter, *Hughes* has no far reaching implication and does not advance Petitioner's argument. In that case, the court affirmed an

award of attorneys' fees to the defendants who prevailed on a *forum non conveniens* motion. The court held that federal law is "inapplicable to a case resolved by a dismissal pursuant to the doctrine of *forum non conveniens*." *Id.* at 787. The court also held that, based on Alaskan precedent, once an action is brought in state court, federal law does not apply. *See id.* at 787. According to the Alaska state court, "admiralty law does not prohibit the award of attorney's fees and costs in admiralty cases decided in state courts under the savings to suitors jurisdiction". *Id.* The court held that it would not consider federal case law that prohibited the award of attorneys' fees based on the American Rule as applied in maritime cases because "the cited cases involve situations where federal admiralty law is litigated in federal court." *Id.* at 788. Notably, the court even acknowledged that its approach to the issue was unusual. The court observed that "[i]n general, *all federal courts (and all state courts with the exception of Alaska) follow the 'American rule,'* pursuant to which neither party is entitled to an award of attorney's fees." *Id.* (emphasis added). Petitioner labels *Hughes* as the most "cogent" authority on the issue. However, the court's rationale is inapplicable and in some instances simply dubious.

In sum, the federal maritime law in the area of state fee-shifting statutes in ordinary maritime disputes is uniform, no doubt attributed in part to the principles this Court articulated in *Alyeska Pipeline* and similar cases. Federal courts consistently reject

state fee-shifting legislation because it conflicts with federal substantive maritime law, which adheres to the American Rule. There is no "split" in authority in ordinary federal maritime contract disputes, as Petitioner argues. Thus, Petitioner's primary argument for overturning *Jensen* – that it has been criticized for producing inconsistent results – is simply misplaced in this context.

C. Petitioner's criticisms of the Eleventh Circuit's analysis fare no better.

Petitioner asks this Court to grant Certiorari because the court of appeals erroneously determined that maritime law governed the contract claim. According to Petitioner, maritime law does not apply because "the general contract for the construction was governed by Georgia law and [] Norfolk removed material outside the Savannah River's navigable channel." Petition at 23 (citing App. at 7a-10a). The Appendix citations do not support the proposition Petitioner advances. Regardless, the primary objective of the contract was dredging a navigable waterway in a port that services international and national commerce. The dredging work thus had a direct effect on maritime services and commerce. *See Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 495-97 (2005); *Ellis v. United States*, 206 U.S. 246, 259 (1907). That other parties executed a separate construction contract for work that was unrelated to Petitioner's dredging work is of no consequence.

Petitioner's contract neither designated Georgia law nor included a fee-shifting statute. It was therefore governed by federal maritime law.

Petitioner also asserts the court of appeals erred because Petitioner's claims were asserted under "diversity jurisdiction." However, as explained above, Petitioner answered the complaint without challenging the district court's jurisdiction to hear the admiralty dispute. Petitioner never asserted diversity jurisdiction as a basis for jurisdiction. App. at 4a. Regardless, the court of appeals properly applied this Court's controlling precedent. *See Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 411, (1953) ("[S]ubstantial rights . . . are not to be determined differently whether [a] case is labeled 'law side' or 'admiralty side' on a district court's docket").[9]

Finally, Petitioner argues that the court of appeals misapplied *American Dredging*. However, *American Dredging* supports the court of appeals' determination that substantive maritime law preempts the GPPA. In that case, this Court addressed whether federal maritime law preempted a Louisiana statute that rendered *forum non conveniens* unavailable in certain maritime lawsuits filed in state court. This Court

---

[9] Petitioner cites to Rule 9 of the Federal Rules of Civil Procedure as controlling the substantive law in cases in which there is diversity and in which maritime law applies. However, the comments to the rules discuss the designate in terms of affecting "procedural consequence," not substantive laws. *See* FED. R. CIV. P. 9 advisory committee's note (1966 amendment).

recognized that the case was different than other preemption cases because the state law was procedural. *See id.* at 447 (" . . . a state court may adopt such remedies, and attach to them such incidents, as it sees fit so long as it does not attempt to make changes in substantive maritime law") (quotations omitted). The fact that the Louisiana statute was procedural was important because, as this Court explained, "[u]niformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world." *Id.* at 453. This Court held that "*forum non conveniens* does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." *Id.* at 454. Nor, given the discretionary nature of the procedural rule, is it correct to say that it can be "relied upon in making decisions about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued." *Id.* at 455. Accordingly, federal maritime law did not preempt the state procedural rule.

In emphasizing that its holding was grounded in the fact that the rule at issue was procedural rather than substantive, the Court rejected the notion that federal courts would be bound by the state law: "It is because *forum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum, that the dissent is wrong to say our decision

will cause federal-court *forum non conveniens* determinations in admiralty cases to be driven, henceforth, by state law." *Id.* at 454 n. 4. *American Dredging* does not support Petitioner's argument that federal courts in maritime disputes must give effect to *substantive* fee-shifting statutes that conflict with the American Rule.

Unlike the Louisiana procedural rule, the GPPA modifies *substantive* federal maritime fee-shifting laws. The 1853 Act, which effectively prohibited federal courts' practice of deferring to state fee-shifting statutes, included specific statutory regulations that governed fee-shifting in federal maritime cases. Additionally, the narrow judicially-recognized exceptions to the American Rule's general prohibition on fee-shifting include the bad faith exception which arose in the context of a maritime dispute involving maintenance and cure. *See Vaughan v. Atkinson*, 369 U.S. 527 (1962). It is no wonder that, in maritime disputes, federal courts consistently recognize that claims for attorneys' fees are governed by the American Rule and must, therefore, be analyzed under the standards set forth in the federal cases discussed in the previous section.[10]

---

[10] Unlike procedural *forum non conveniens* rules, federal courts consistently hold that the American Rule is the *substantive* maritime law that applies in federal maritime disputes. *See, e.g., Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982) ("a court has inherent power in an admiralty suit to assess attorneys' fees when a party has

(Continued on following page)

Further, given that the GPPA seeks to substantially shift the parties' substantive risks, the law affects both primary and secondary conduct as described in *American Dredging*.[11] State fee-shifting

---

'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' "); *American National Fire Ins. Co. v. Kenealy*, 72 F.3d 264, 270 (2nd Cir. 1995) ("*Ingersoll* . . . stated the federal prohibition against attorneys' fees in admiralty suits in the broadest of terms . . . [w]e believe that our holding in *Ingersoll* suffices to 'establish' a federal admiralty rule, which now must be followed instead of state law."); *Kopacz v. Delaware River and Bay Authority*, 248 Fed. Appx. 319, 322 (3rd Cir. 2007) (in maritime disputes, the "[a]ttorneys' fees and costs 'cannot be recovered unless plaintiff can first establish defendant's bad faith or recalcitrance.' "); *Geftman v. Boat Owners Association of the United States*, Cause No. C/A 2:02-1461-18 2003 WL 23333312 (D. S.C. 2003) ("[a]ttorney's fees are awarded under admiralty law solely under a rare exception to the 'American Rule.' "); *Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1011 (5th Cir. 1984) ("[t]he general rule in admiralty is that attorneys' fees are not recoverable by the prevailing party"); *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 74 (8th Cir. 1988) (in a federal maritime dispute, "the traditional American rule provides that the prevailing party in federal litigation is generally not entitled to attorney's fees."); *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir. 2009) (" '[a]bsent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees.' "); *Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1193 (11th Cir. 2001) ("[t]he prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course").

[11] Petitioner's claim that the Court was only concerned with primary conduct is not found anywhere in the opinion, and it is

(Continued on following page)

statutes like the GPPA certainly affect primary conduct. If, for example, state fee-shifting statutes were given affect, parties who never agreed or intended to shift the risk of attorneys' fees would have to include further expenses to draft contracts to avoid such state statutory provisions or to include law selection clauses that designates a state that has not attempted to statutorily modify the American Rule. The statutes also affect secondary conduct. If parties were unable to contract around state fee-shifting statutes, they would seek out jurisdictions that do not compel a result that is contrary to their intended bargained-for agreement. Thus, under the Court's *American Dredging* analysis, fee-shifting statutes affect primary and secondary conduct and would plainly cause significant discord in an area that has been uniform.

Petitioner's critique of the Eleventh Circuit's opinion fails to identify a misapplication of the federal law or a result that is in conflict with controlling authority. Instead, as is evident from the cases discussed above, the Eleventh Circuit's opinion is consistent with the opinions of other circuits that have addressed the applicability of fee-shifting statutes in ordinary maritime contract disputes. Moreover, the Eleventh Circuit's opinion is consistent with

---

doubtful the Court intended its analysis of secondary conduct to be superfluous.

American Dredging, which addressed state procedural rules rather than substantive laws.

D. Federal courts should not permit state legislators to rewrite maritime contracts.

Petitioner seeks to overturn a ninety-three year-old decision in order to accomplish that which federal maritime law enables it to accomplish on its own. The American Rule does not prohibit parties from shifting the risk of attorneys' fees in their contracts. *See F.D. Rich Co., Inc.*, 417 U.S. at 127. Thus, fee-shifting clauses are regularly enforced as a matter of contract in federal maritime cases. *See Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1196 (11th Cir. 2001) (attorneys' fees were properly awarded in a maritime case where a specific contractual provision was interpreted to provide the recovery of attorneys' fees); *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1250 (11th Cir. 2000) ("A party is not entitled to attorney's fees in an admiralty case unless fees are statutorily or contractually authorized.").

Petitioner chose not to include a fee-shifting provision in its dredging contract, and the parties never agreed to bear the risk of indemnifying a prevailing party for its fees. Perhaps Petitioner realized that any fee-shifting clause would have to be reciprocal and did not want to bear the risk of paying for Respondent's fees in the event of adverse

litigation. As the court of appeals held, "Norfolk was a sophisticated party who was, or should have been, well aware of the law of our Circuit concerning attorneys' fees in maritime cases." App. at 12a. The parties, in effect, contractually waived any right to recover fees from the other party.

Although Petitioner never agreed to a fee-shifting clause, and certainly never compensated Respondent for shouldering the additional risk, Petitioner seeks to impose state legislation that would re-write the party's substantive maritime agreement. However, in *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961), this Court held that "were contracts of the kind alleged in this complaint known to be a normal phenomenon in maritime affairs, we think that there would be little room for argument in favor of allowing local law to control their validity." In *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14 (2004), a unanimous Court called for a "uniform meaning of maritime contracts" and reiterated that "[i]t certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *Id.* at 28. Respondent, a Florida company, entered into a maritime dredging contract with Petitioner, a Virginia company, knowing the prevailing uniform maritime law only permits recovery of fees where they are allowed

by federal legislation, a contract, or one of the narrow exceptions to the American Rule. Substantive federal maritime law requires the parties' agreement to be enforced as written by them.

The court of appeals was correct that "[t]he [state statute] will not serve as an escape clause for Norfolk when the legal framework for the shifting of attorneys' fees was clear prior to Norfolk's drafting of the contract." To hold otherwise would not only significantly disrupt maritime parties' rights to have their agreements enforced in a manner that is consistent with the bargained-for consideration, it would also upset the uniform and predictable results the American Rule has provided in ordinary maritime contract disputes.

CONCLUSION

This Court has held that it will not "judicially obviate the American Rule" or recognize any further exceptions to it. The relief Petitioner seeks is irreconcilable with this Court's unchallenged precedent. Further, if *Jensen* is prone to causing inconsistent results, it is in contexts other than fee-shifting legislation, as the circuits that have addressed the issue have adhered to a uniform and predictable rule. Thus, the debate over the appropriate framework of *Jensen* is better left for a dispute that arises in a context that better illustrates the supposed "patchwork" Petitioner asks the Court to correct. And it is

unnecessary to overturn ninety-three years worth of judicial precedent to provide Petitioner with a remedy that it was capable of obtaining all along. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

DANIEL D. PIPITONE
Counsel of Record
STEVEN J. KNIGHT
CHAMBERLAIN, HRDLICKA, WHITE
WILLIAMS & MARTIN, P.C.
1200 Smith Street, Suite 1400
Houston, Texas 77002
Telephone: (713) 658-1818
Facsimile: (713) 658-2553
daniel.pipitone@chamberlainlaw.com
steven.knight@chamberlainlaw.com

Attorneys for Respondent Misener Marine Construction, Inc.

28 U.S.C. § 1923. Docket fees and costs of briefs

(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

> $20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;
>
> $20 in admiralty appeals involving not over $1,000;
>
> $50 in admiralty appeals involving not over $5,000;
>
> $100 in admiralty appeals involving more than $5,000;
>
> $5 on discontinuance of a civil action;
>
> $5 on motion for judgment and other proceedings on recognizances;
>
> $2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys and United States trustees shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than:

> $25 where the amount involved is not over $1,000;

$50 where the amount involved is not over $5,000;

$75 where the amount involved is over $5,000.

Ga. Code Ann. § 13-11-8. Attorneys' fees

In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be.

No. 09-1164

Supreme Court, U.S.
FILED
MAY 28 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

MISENER MARINE CONSTRUCTION, INC. and TRAVELERS' CASUALTY AND SURETY COMPANY OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
E-Mail lawdjb@emory.edu

JAMES L. CHAPMAN, IV
W. RYAN SNOW
GUILFORD D. WARE
Of Counsel
CRENSHAW, WARE & MARTIN, P.L.C.
1200 Bank of America Center
Norfolk, Virginia 23510
Phone (757) 623-3000

Attorneys for Petitioner

REPLY TO BRIEF IN OPPOSITION

In its Brief in Opposition ["Op. Cert."], Misener Marine Construction ("Misener") essentially argues that the lower court's decision is correct in all respects. Without anticipating any briefing on the merits (should the Court decide that this matter cannot be disposed of summarily), Petitioner takes issue with four points made by Respondent.

1. Misener makes light of the current split in authority on whether state-statutory awards of attorneys fees are impliedly preempted by the federal general maritime law. Respondent concedes, Op. Cert. 24, that a number of marine insurance cases have allowed state-law grants of attorneys' fees. See *Pace v. Insurance Co. of North America*, 838 F.2d 572, 578-79 (1st Cir. 1988); *INA of Texas v. Richard*, 800 F.2d 1379, 1381 (5th Cir. 1986); and *All Underwriters v. Weisberg*, 222 F.3d 1309, 1315 (11th Cir. 2000). But Misener argues that because marine insurance is regulated by state law, these authorities are inapposite. That is no different a situation as when a federal court is deciding a claim within diversity jurisdiction, as occurred here.

2. Misener thus asserts that it was incumbent on Norfolk to dispute its assertion of admiralty jurisdiction in the underlying case. Op. Cert. 3. In fact, Norfolk made clear that its counterclaim and third-party claim were brought under diversity jurisdiction. See Dist. Ct. Dckt.175, at 17 (proposed pre-trial order). Norfolk's counterclaim specifically invoked the Georgia Prompt Pay Act (GPPA), Ga. Code

Ann. § 13-11-1 *et seq.*; Pet. App. 34a.

Despite Misener's invocation of the significance of the Port of Savannah, see Op. Cert. 1-2, 26, such is not talismanic for a determination of admiralty jurisdiction. As this Court intimated in *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004), not all contracts involving water-based activities necessarily implicate "maritime service[s] or . . . . transactions." Likewise, courts have held that not all contracts for dredging services fall into admiralty jurisdiction. See *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349, 350-51 (5th Cir. 1980). All this belies Misener's assumption that federal admiralty jurisdiction went unchallenged here.

3. Inasmuch as Norfolk's counterclaim was cognizable within diversity jurisdiction, Respondent's lengthy discussion of the American Rule and this Court's ruling in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), is beside the point. As this Court made quite clear in *Alyeska*, in diversity cases, a state statute providing for award of attorneys' fees should be followed, absent conflict with a federal statute or court rule.[1] Id. at 259 n.31 ("A very

---

[1] Misener's citation of 28 U.S.C. § 1923, Op. Cert. 13, 19, as an ostensibly contrary federal statute, is unavailing. This provision applies only to the reimbursement of "docket fees" in admiralty actions as "costs." Op. Cert. App. 1a. It has been held, by one court at least, as not having survived the introduction of the Federal Rules of Appellate Procedure. See *Waterman S.S. Co. v. Gay Cottons*, 419 F.2d 372 (9th Cir. 1969).

different situation is presented when a federal court sits in a diversity case.").

4. As Petitioner previously briefed, see Pet. 24, whether Norfolk's claims are properly characterized as within diversity jurisdiction turns on whether this Court's opinion in *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953), when read with the implied preemption doctrine of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), extends so far as to bar the award of state-statutory attorneys' fees for diverse counterclaims. As Misener concedes, see Op. Cert. 8, 17-18 & n.6, 27-28 n.9, 29-30 n.10, this depends on whether a losing party's avoidance of an award of attorneys' fees is truly a "substantial right[]." *Pope & Talbot*, 346 U.S. at 411.

While this Court indicated in *Alyeska* that federal courts are obliged, in diverse matters, to adopt those state fee-shifting statutes which reflect "a substantial policy of the state," 421 U.S. at 259 n.31, that is not the same as saying that an award of attorneys' fees is a substantive rule of decision. Indeed, this Court has spoken to the "procedural implications" of the American Rule. See *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933); see also *Boeing Co. v. Van Gemert*, 444 U.S. 472, 483 (1980) (Rehnquist, J., dissenting). And while the potential collection of attorneys' fees may create a liability imposed by statute, in all instances the receipt of attorneys' fees is ancillary to prevailing on a substantive claim of right.

Viewed in this way, Misener's characterization of the Eleventh Circuit's *Jensen* discussion, see Op. Cert. 31, essentially replicates the confusion in the decision below. The whole point of this Court's analysis

in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), was to cut through the metaphysical thicket of procedure/substance distinctions. In its place, the Court emphasized whether a certain rule affected primary conduct. See id. at 454-55. Under Respondent's treatment, virtually any rule would qualify as affecting "primary conduct," because lawyers will always seek *ex ante* the best results for their clients and thus will negotiate or contract around the possibility that attorneys' fees might be awarded.

But, as the Alaska Supreme Court explained in *Hughes v. Foster Wheeler Co.*, 932 P.2d 784, 790-91 (Alaska 1997), this Court's concern with "primary conduct" went to the matter of "how [entities] . . . manage their business and what precautions to take." *American Dredging*, 510 U.S. at 454. In maritime law, such matters going to primary behavior would chiefly include principles of liability – adherence to the nautical Rules of the Road, 33 U.S.C. §§ 1601, 2001 et seq., for example. Even under this Court's analysis of "secondary conduct" – "in deciding, for example, where to sue or where one is subject to being sued," 510 U.S. at 455 – it is doubtful whether the possibility of being subject to a state fee-shifting statute, such as the GPPA, would really alter business behavior.

Put simply, if the court of appeals' analysis is left undisturbed, virtually any state-law rule would seem to qualify for implied preemption under *Jensen*. Not only would this Court's limiting calculus in *American Dredging* be fatally undermined, but the Pandora's Box of *Jensen*'s overweening implied preemption doctrine would, once again, be opened and allowed to subvert

fundamental principles of judicial federalism.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

DAVID J. BEDERMAN
Counsel of Record
1301 Clifton Road
Atlanta, Georgia 30322-2770
Phone (404) 727-6822
E-Mail lawdjb@emory.edu

JAMES L. CHAPMAN, IV
W. RYAN SNOW
GUILFORD D. WARE
Of Counsel
Crenshaw, Ware & Martin, P.L.C.
1200 Bank of America Center
Norfolk, Virginia 23510
Phone (757) 623-3000

Attorneys for Petitioner

May 28, 2010